

## TABLE OF CONTENTS

<b>I. LEGAL ANALYSIS.....</b>	<b>3</b>
A.....	3
B. BACKGROUND AND INTRODUCTION .....	3
B. PROCEDURAL POSTURE, PERMISSIBLE EVIDENCE AND BURDENS OF PROOF .....	7
C. CONCLUSION.....	29
<b>II. ANALYSIS OF QUANTITATIVE EVIDENCE .....</b>	<b>30</b>
A. INTRODUCTION.....	30
B. AVAILABILITY ESTIMATES .....	34
C. CONTRACTING ACTIVITY .....	38
D. UTILIZATION ANALYSIS .....	39
E. DATA LIMITATIONS .....	39
E. DISPARITY INDICES .....	50
F. SUMMARY OF QUANTITATIVE ANALYSIS .....	65
<b>III. HISTORICAL ANALYSIS.....</b>	<b>67</b>
A. INTRODUCTION.....	67
B. EMPLOYMENT TRENDS.....	68
C. BLACKS IN ANTEBELLUM KENTUCKY .....	69
D. RECONSTRUCTION AND THE JIM CROW ERA .....	75
E. RECONSTRUCTION.....	76
F. THE CIVIL RIGHTS ERA AND THE PUSH TOWARD POWER SHARING .....	93
<b>IV. ANALYSIS OF PURCHASING POLICIES, PRACTICES &amp; PROCEDURES.....</b>	<b>106</b>
<b>V. ANALYSIS OF QUALITATIVE EVIDENCE</b>	
131	
A. INTRODUCTION.....	131
B. GENERAL MARKET CONDITIONS AND BARRIERS.....	133
C. DISCRIMINATION THAT AFFECTS THE ABILITY OF M/WBES TO COMPETE.....	140
D. DISCRIMINATION THAT AFFECTS THE VIABILITY AND CAPACITY OF M/WBES...	148
E. DISPARITY STUDY PUBLIC HEARING - FINDINGS REPORT .....	156
F. CONCLUSION.....	166

**VI. EXISTING RACE & GENDER-NEUTRAL  
PROGRAMS .....167**

**VII. CONCLUSIONS & RECOMMENDATIONS  
.....176**

A. INTRODUCTION.....	176
B. ACCESS TO GOVERNMENT CONTRACTS .....	180
C. CAPITAL.....	187
D. BONDING .....	192
E. BUSINESS DEVELOPMENT AND TRAINING.....	193
F. NON-DISCRIMINATION PROGRAM.....	194

# I. LEGAL ANALYSIS

## A. Background and Introduction

The purpose of this disparity study is to evaluate the need and basis for the enactment of a Minority/Women Business Enterprise program by the Commonwealth of Kentucky (hereinafter "Kentucky" or "the Commonwealth"). In order to ensure that public contracting opportunities are equally available to minorities and women, Kentucky has dedicated itself to creating a program that will not only address the needs of willing and capable minority and women business owners, but also render a more diverse and equitable business environment that will benefit all its citizens.

State initiatives which seek to employ "race conscious" measures of ensuring equal opportunity must satisfy the most exacting standards, in order to comply with constitutional requirements. These standards and principles of law were applied and closely examined by the Supreme Court in City of Richmond v. J.A. Croson Company, 488 U.S. 469 (1989), 709 S.Ct. 706, and Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 115 S.Ct. 2097 (1995). The Croson decision represents the definitive legal precedent which established "strict scrutiny" as the standard of review by which state and local programs that grant or limit government opportunities based on race are evaluated. The Adarand decision subsequently extended the "strict scrutiny" standard of review to race conscious programs enacted by the federal government.

In rendering the Croson decision in January 1989, the U.S. Supreme Court held that the City of Richmond's minority business enterprise ordinance--which mandated that majority-owned prime contractors to whom the City of Richmond had awarded contracts, subcontract 30% of their construction dollars to minority-owned subcontractors--violated the equal protection clause of the fourteenth amendment to the United States Constitution. In a six-to-three majority decision, the Court held that state and local programs which allocate, or "set aside," a portion of public contracting exclusively to minority-owned businesses must be able to meet a "strict scrutiny" standard of review if race, a suspect classification, is considered.

The strict scrutiny test requires race or ethnicity-based programs to be based upon a compelling governmental interest and that they must be narrowly tailored to achieve

that interest. See also Engineering Contractors Assoc. of South Florida, Inc. v. Metropolitan Dade County, 122 F.3d 895 (11<sup>th</sup> Circuit 1997); Associated General Contractors v. Drabik, 214 F.3d (6<sup>th</sup> Circuit 2000). The strict scrutiny test further requires a "searching judicial inquiry into the justification" for the preferences to determine whether the classifications are remedial or "in fact, motivated by the illegitimate notions of social inferiority or simple social politics".<sup>1</sup>

It is important to note that the "strict scrutiny" standard of review represents the highest level of judicial scrutiny, and is used to test the legality of all state programs which consider race as a determining factor. Conversely, some lower courts, in subsequent decisions, have applied an "intermediate" level of scrutiny to state programs that use gender as a determining factor, and assist women-owned businesses.

Kentucky has confronted the issue of "affirmative action" in the Sixth Circuit Court of Appeals and the District Court for the Western Division on several occasions. Generally, the decisions have been consistent with the analysis and principles of law set forth in Croson. However, there are anomalies among some of the more recent opinions, which present judicial modification and expansion of the principles of law in Croson, with regard to data collection and other evidentiary matters. These cases are of particular importance to Kentucky. This legal analysis includes an extended discussion of public contracting, Kentucky Constitution, Equal Protection Clause, and Equal Employment Opportunity Commission (hereinafter "EEOC") cases from these courts, which have had a direct impact on the methodology employed by Griffin & Strong, in conducting our disparity study for Kentucky. We will discuss the legal principles outlined by the Supreme Court and lower courts in setting forth the specific requirements that governments must follow in forming affirmative actions plans.

### **The Croson Decision**

In its Croson decision, the Supreme Court ruled that the City of Richmond's Minority Business Enterprise (hereinafter "MBE") program failed to satisfy both prongs of the strict scrutiny standard.<sup>2</sup> The City failed to show that its minority set-aside program was "necessary" to remedy the effects of discrimination in the marketplace. The City of

---

<sup>1</sup> 488 U.S. at 493

<sup>2</sup> Id at 469,507



Richmond had not demonstrated the necessary discrimination. The Court reasoned that a mere statistical disparity between the overall minority population in Richmond (50 percent African-American) and awards of prime contracts to minority-owned firms (0.67 percent to African-American firms) was an irrelevant statistical comparison and insufficient to raise an inference of discrimination. Regarding the evidence that Richmond provided to support its goal program, the Court emphasized the distinction between "societal discrimination", which it found as an inappropriate and inadequate basis for social classification, and the type of identified discrimination that can support and define the scope of race-based relief. The Court noted that a generalized assertion that there has been past discrimination in an entire industry provided no guidance to determine the present scope of the injury it seeks to remedy. The Court emphasized, "there was no direct evidence of race discrimination on the part of the City in letting contracts or any evidence that the City's prime contractors had discriminated against minority-owned subcontractors." *Id* at 480.

In short, the Court concluded there was no *prima facie* case of a constitutional or statutory violation by anyone in the construction industry. Justice O'Connor did opine, however, what evidence might indicate a proper statistical comparison: "where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise".<sup>3</sup> In other words, the statistical comparison would be one between the percentage of MBEs in the market qualified to do contracting work (including prime contractors and subcontractors) and the percentage of total City contracting dollars awarded to minority firms. The relevant question among lower federal courts has been how to determine this particular comparison. See discussion of statistical comparison *infra*.

Additionally, the Court stated that identified anecdotal accounts of past discrimination could also provide the basis to establish a compelling interest for local governments to enact race-conscious remedies. However, conclusory claims of discrimination by City officials would not suffice. In addition, the Court held that Richmond's MBE program was not remedial in nature because it provided preferential treatment to minorities such as Eskimos and Aleuts, groups for which there was no

---

<sup>3</sup> *Id* at 509

evidence of discrimination in Richmond. In order to uphold a race or ethnicity based program, there must be a determination that a strong basis in evidence exists to support the conclusion that the remedial use of race is necessary. A strong basis in evidence cannot rest on an amorphous claim of societal discrimination, on simple legislative assurances of good intention or congressional findings of discrimination in the national economy.

Regarding the second prong of the strict scrutiny test, the Court ruled that Richmond's MBE program was not narrowly tailored to redress the effects of discrimination. First, the program extended to a long list of ethnic minorities (e.g. Aleuts) for which the City had established no evidence of discrimination. Thus, the scope of the City's program was too broad. Second, the Court ruled that the thirty percent (30%) goal for MBE participation in the Richmond program was a rigid quota not related to identified discrimination. Specifically, the City was criticized for its lack of inquiry into whether a particular minority business, seeking racial preferences, had suffered from the effects of past discrimination. Third, the Court expressed disappointment that the City failed to consider race-neutral alternatives to remedy the under-representation of minorities in contract awards. Finally, the City's MBE program contained no sunset provisions for a periodic review process whose function is to assess the continued need for the program.<sup>4</sup>

Thus, in order for states, municipalities, and other local governments to satisfy the narrow tailoring prong, the Croson Court suggested analyzing the following factors:

- Whether the MBE program covers minorities or women for which there is evidence of discrimination (i.e. statistical disparity, anecdotal evidence, etc.);
- Whether the size of the MBE participation goal is flexible and contains waiver provisions for prime contractors who make a "good faith" effort to satisfy MBE utilization goals, but are unsuccessful in finding any qualified, willing and able MBEs;
- Whether there was a reasonable relationship between the numerical goals set and the relevant labor pool of MBEs capable of performing the work in the marketplace;

---

<sup>4</sup> Id at 500

- Whether race-neutral alternatives were considered before race-conscious remedies were enacted; and
- Whether the MBE program contains sunset provisions or mechanisms for periodic review to assess the program's continued need.

## **B. Procedural Posture, Permissible Evidence and Burdens of Proof**

This section is a review of the methodology upon which courts rely in reviewing legal challenges to M/WBE programs. First, we will discuss the standing requirements for a plaintiff to maintain a suit against a M/WBE program; secondly, an analysis of the standard of review of equal protection that governs the courts' analyses; thirdly, we will review the evidentiary requirements courts utilize to determine proof of discrimination; and lastly, the burden of production and proof the courts require of the parties in these cases.

### ***1. Standing***

As a result of the Croson decision, numerous legal challenges to MBE set-aside programs have come before the courts. There has been a flurry of legal challenges to state and local affirmative action programs. Standing is important because it is usually pivotal in determining a party's relevance in a lawsuit. Thus, if a MBE program is properly constructed and administered, there should be no legitimate claims of reverse discrimination by majority contractors resulting in a lawsuit. Under the traditional standing analysis, in order to satisfy the "injury in fact" requirement, plaintiffs must establish a causal connection between the injury, the ordinance, and the likelihood that the injury will be redressed by a favorable decision. Moreover, the Courts may not tolerate a lawsuit unless the plaintiff shows some "concrete and particularized" injury that is in fact imminent, and which amounts to something more than "conjectural or hypothetical" injury.<sup>5</sup>

---

<sup>5</sup> See Cone Corp. v. Hillsborough County, 1994 WL 371368; Cone Corp., 1994 WL 526019 (M.D. Fla. 1994) (Court imposed Rule 11 sanctions based on plaintiffs' complaint which failed to establish injury in fact). See also Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

Nevertheless, Justice Thomas' opinion in Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville, Florida, et al., 508 U.S. 656, 113 S.Ct. 2297, (1993), has modified the traditional standing requirement for contractors challenging local and state government minority preference schemes. The Court relaxed the injury in fact requirements by holding that so long as the non-minority contractor can show that they were "able and qualified to bid" on a contract subject to the City's ordinance, the "injury in fact" arises from an inability to compete with M/WBEs on an equal footing due to the ordinance's "discriminatory policy."<sup>6</sup> Specifically, the Court stated:

When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. And in the context of a challenge to a set-aside program, the "injury in fact" is the inability to compete on an equal footing in the bidding process, not the loss of a contract. To establish standing, therefore, a party challenging a set-aside program...need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal footing. 508 U.S. at 666.

More recently, in Associated General Contractors of America v. City of Columbus, 172 F.3d 411 (6<sup>th</sup> Cir. 1999), the United States Court of Appeals for the Sixth Circuit issued a decision which addressed the injury in fact element of the standing requirement. In Associated General Contractors, a contractors association brought an action challenging the constitutionality of the City of Columbus' minority business set aside ordinance. The Federal District Court for the Southern District of Ohio struck down the ordinance and the City moved for relief from judgment, *inter alia*, after enacting a new set-aside ordinance. The Court of Appeals held, in pertinent part, that the contractors association could not demonstrate the injury in fact required to establish standing to challenge the constitutionality of the second minority business set-aside ordinance that was enacted by the City, but had not yet been put into effect. The Court

---

<sup>6</sup> See Contractors Assn. of Eastern Pennsylvania v. City of Philadelphia, 6 F.3d 990, 995 (3rd Cir. 1993); Concrete Works of Colorado v. City and County of Denver, 36 F.3d 1513, 1518 (10th Cir. 1994); (concrete works submitted and the ordinance prevented it from competing on an equal basis.); Webster Greenthumb v. Fulton County, 51 F.Supp. 2d 1354 (Plaintiff Greenthumb demonstrated that it was able to bid on contracts and a discriminatory policy prevented it.)

further stated that any injury foreseen as a result of the ordinance could not be other than hypothetical or conjectural until the ordinance was put into effect.

The Sixth Circuit explained:

Once the set-aside program was gone, the constitutional violation was gone, and no condition requiring repair remained. The remedy was complete. The agreed order, however...enjoined the City from enacting any new set-aside legislation without first obtaining District Court approval--thus, the decree aimed at eliminating a condition that did not yet exist, a condition that, at most, might violate the Constitution, if that condition should in fact materialize. 172 F.3d at 418.

Lastly, in Adarand, the Supreme Court continues to find standing in cases in which the challenging party makes "an adequate showing that sometime in the relatively near future it will bid on another government contract."<sup>7</sup> That is, if the challenging party is very likely to bid on future contracts, and must compete for such contracts against MBEs, then that contractor has standing to bring a lawsuit.

## 2. *Equal Protection Clause Standards*

The second preliminary matter that courts address is the standard of equal protection review that governs their analysis. The Fourteenth Amendment provides that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."<sup>8</sup>

### a. *Judicial Standards of Review*

Courts determine the appropriate standard of equal protection review by examining the protected classes embodied in the statute. The courts apply *strict scrutiny* to review an ordinance's race-based preference scheme and inquire whether the law is narrowly tailored to achieve a compelling governmental interest. Conversely, gender-based classifications are evaluated under the *intermediate scrutiny* rubric, which provides

---

<sup>7</sup> Adarand, 515 U.S. 200, 211, 115 S.Ct. 2097, 2105.

<sup>8</sup> U.S. Const. amend. XIV, § 1.

that the statute must be substantially related to an important governmental objective.<sup>9</sup> Therefore, race-conscious affirmative action is subject to a much higher standard of judicial review than gender-conscious affirmative action.

### 1) Strict Scrutiny

In order for a local governmental entity to constitutionally enact a M/WBE ordinance which awards contracts it must show a *compelling governmental interest*. This compelling interest must be proven by demonstrating particularized findings of past discrimination. The strict scrutiny test ensures that the means used to address the compelling goal of remedying past discrimination "fit" so closely that there is little likelihood that the motive for the racial classification is illegitimate racial prejudice or stereotype.<sup>10</sup> After legislative or administrative findings of constitutional or statutory violations, local governments have a compelling interest in remedying past discrimination.

The Courts have also ruled that general societal discrimination is not a compelling interest which justifies the use of race-based measures.<sup>11</sup> Rather, there must be some showing of prior discrimination by the governmental actor involved, either as an "active" or "passive" participant.<sup>12</sup> The governmental entity must point to an identified discrimination in the area, and in the industry to which the plan applies. A *prima facie* case of intentional discrimination is deemed sufficient to support a local government's affirmative action plan. However, generalized assertions that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to redress.<sup>13</sup>

Since all racial classifications are viewed as legally suspect, the governing body must show a "sound basis in the evidence" of discrimination in order to justify any enactment of race conscious legislation. Merely stating a "benign" or "remedial" purpose does not constitute a "strong basis in evidence" that the remedial plan is necessary, nor

<sup>9</sup> Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724, 102 S.Ct. 3331, 3335. See Engineering Contractors Association of South Florida, Inc., et al v. Metropolitan Dade County, et al, 122 F.3d 895 (11<sup>th</sup> Cir. 1997) (Eleventh Circuit explaining U.S. v. Virginia, and the appropriate gender-based affirmative action equal protection analysis).

<sup>10</sup> Croson, 488 U.S. 469, 493, 109 S.Ct. 706, 721. See also, Adarand, 515 U.S. 200, 235, 115 S. Ct. 2097, 2117; Hopwood v. State of Texas, 78 F.3d 932, 951 (5<sup>th</sup> Cir. 1996).

<sup>11</sup> Id. at 496-97, 723. See Miller v. Johnson, 515 U.S. 900, 922, 115 S.Ct. 2475, 2491 (1995).

<sup>12</sup> Id. at 498, 724.

<sup>13</sup> Id. at 498-99, 724. See Miller, 515 U.S. 900, 921, 115 S.Ct. 2475, 2491.

does it establish a *prima facie* case of discrimination. Thus, the local government must identify the discrimination it seeks to redress.<sup>14</sup> Particularized findings of discrimination are required under Croson. Although Croson places the burden on the government to demonstrate a "strong basis in evidence", the Fourteenth Amendment does not require a court to make an ultimate judicial finding of discrimination before the government may take affirmative steps to eradicate discrimination.

In Concrete Works I, 36 F.3d 1513 (10<sup>th</sup> Cir. 1994), the Tenth Circuit Court of Appeals reversed the District Court's granting of summary judgment for the City of Denver, which had determined that Denver's factual showing of past race and gender discrimination justified its compelling government interest in remedying the discrimination. In reversing, the Tenth Circuit held that factual issues of dispute existed about the accuracy of Denver's public and private discrimination data, but noted that Denver had shown evidence of discrimination in both the award of public contracts and within the Denver MSA that was particularized and geographically based. On remand, Denver needed only to come forward with evidence that its ordinance was narrowly based, whereupon it became Concrete Works' burden to show that there was no such strong basis.

The types of evidence routinely presented to show the existence of a compelling interest include statistical and anecdotal evidence.<sup>15</sup> Where gross statistical disparities exist, they alone may constitute *prima facie* proof of a pattern or practice of discrimination. Anecdotal evidence, such as testimony from minority contractors, is most useful as a supplement to strong statistical evidence.<sup>16</sup> Nevertheless, anecdotal evidence is rarely so dominant that it can, by itself, establish discrimination under Croson. The "combination of anecdotal and statistical evidence," however, is viewed by the courts as "potent."<sup>17</sup>

If there is a strong basis in evidence to justify a race or ethnic program, the next step of the strict scrutiny test is whether the M/WBE program is narrowly tailored to

---

<sup>14</sup> Id. at 500-501, 725.

<sup>15</sup> Id. at 501, 725-26. See, United Black Firefighters Assn. v. City of Akron, 976 F.2d 999, 1009 (6th Cir. 1992). See also, Engineering Contractors, 122 F.3d 895 (11<sup>th</sup> Cir. 1997).

<sup>16</sup> Concrete Works, 36 F.3d 1513, 1520. (10<sup>th</sup> Cir. 1994). See Engineering Contractors, 122 F.3d 895, 125-26 (11<sup>th</sup> Cir. 1997); Ensley Branch v. Seibels, 31 F.3d 1548, 1565 (11<sup>th</sup> Cir. 1994).

<sup>17</sup> Coral Construction Co. v. King County, 941 F.2d 910, 920 (9th Cir. 1991).

redress the effects of discrimination. Racial and ethnic preferences must be a remedy of last resort. See Engineers at 926. In Croson, the Court considered four factors:

- (1) whether the city has first considered race-neutral measures, but found them to be ineffective;
- (2) the basis offered for the goals selected;
- (3) whether the program provides for waivers; and,
- (4) whether the program applies only to MBEs who operate in the geographic jurisdiction covered by the program.

Other considerations include the flexibility and duration of the program, that is, whether the program contains a sunset provision or other mechanisms for periodic review of its effectiveness. These mechanisms ensure that the program does not last longer than its intended remedial purpose, and, furthermore, keeps the relationship of numerical goals to the relevant labor market pure, as well as the impact of the relief on the rights of third parties.<sup>18</sup> In Ensley Branch NAACP v. Seibels, 31 F.3d 1548 (11<sup>th</sup> Cir. 1994), the Eleventh Circuit U.S. Court of Appeals also held that four factors should be taken into account when evaluating whether a race or ethnicity-conscious affirmative action program is narrowly tailored:

- (1) the necessity for the relief and the efficacy of alternative remedies;
- (2) the flexibility and duration of the relief, including the availability of waiver provisions;
- (3) the relationship of the numerical goals to the relevant labor market; and
- (4) the impact of the relief on the rights of innocent third parties.<sup>19</sup>

## **2) Intermediate Scrutiny**

The Croson decision failed to evaluate women-owned business ("WBE") programs. As such, subsequent federal appellate courts have addressed and set forth guidelines for evaluating gender based affirmative action programs. Most of these courts have adopted the intermediate scrutiny analysis, rather than the strict scrutiny analysis which is applied to race conscious programs. However, as demonstrated by the analysis

---

<sup>18</sup> Adarand, 515 U.S. 200, 238, 115 S. Ct. 2097, 2118.

<sup>19</sup> Ensley Branch, 31 F.3d 1548, 1569 (11<sup>th</sup> Cir. 1994); Webster v. Fulton County, GA at 1362.



below, it remains unclear how the review of evidence of discrimination for an intermediate level of scrutiny differs from strict scrutiny.

In Coral Construction Company v. King County, 941 F.2d 910 (9<sup>th</sup> Cir. 1991), cert. denied, 502 U.S. 1033, 122 S.Ct. 875, 116 L.Ed. 2d. 780 (1992), the Ninth Circuit Court of Appeals applied an intermediate scrutiny standard in reviewing the WBE section of the county's ordinance. In addition, the Third Circuit U.S. Court of Appeals applied an intermediate level of review in its ruling in Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia, 6 F.3d 990 (3<sup>rd</sup> Cir. 1993). However, the Court opined that it is unclear whether statistical evidence as well as anecdotal evidence is required to establish the standard of discrimination necessary to satisfy the intermediate scrutiny standard; and if so, how much statistical evidence is necessary. Nonetheless, the Court struck down the WBE portion of Philadelphia's programs finding that the City had no statistical evidence and insufficient anecdotal evidence for women-owned construction firms.

The Eleventh Circuit Court of Appeals in Ensley Branch NAACP v. Seibels, addressed the issue in a Title VII action.<sup>20</sup> In this decision, the Eleventh Circuit rejected the argument that, based on Croson, the Supreme Court intended strict scrutiny to apply to gender-conscious programs challenged under the Equal Protection Clause. Since Ensley, the Supreme Court decided United States v. Virginia, 518 U.S. 515, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996), thereby invalidating Virginia's maintenance of the single sex Virginia Military Institution (VMI). Rather than deciding the constitutionality of the VMI program under intermediate scrutiny, the Court held that "parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action."<sup>21</sup> The Court then applied this "exceedingly persuasive justification" standard in invalidating the VMI program. Justice Rehnquist concurred only in the judgment, noting that "the Court . . . introduces an element of uncertainty respecting the appropriate test."<sup>22</sup> Justice Scalia dissented, suggesting that the majority had effectively adopted a strict scrutiny standard to judge the constitutionality of classifications that deny individuals opportunity on the basis of sex.<sup>23</sup> The majority however, neither denied nor affirmed Justice Scalia's analysis.

---

<sup>20</sup> 31 F.3d 1548, 1579 (11<sup>th</sup> Cir. 1994).

<sup>21</sup> U.S. v. Virginia at 529, 2274.

<sup>22</sup> Id. at 559, 2288.

<sup>23</sup> Id. at 571, 2294.

It is not certain whether the Supreme Court intended the VMI decision to signal a heightening in scrutiny of gender-based classifications. Nevertheless, recent federal district courts cases, as in Engineering Contractors Assn. of South Florida, Inc. v. Metropolitan Dade County, 122 F.3d 895 (11<sup>th</sup> Cir. 1997), continue to confine their analysis of WBE programs to traditional intermediate scrutiny.<sup>24</sup> Here the court noted, however, that the measure of evidence required for a gender classification is less clear. The court agreed with the third circuit's holding that intermediate scrutiny requires that evidence be probative, but here the court added that probative must be "sufficient as well." 122 F.3d 895.

#### **b. Passive Participation**

Strict scrutiny requires a strong basis in evidence of either active participation by the government in prior discrimination or passive participation by the government in discrimination by the local industry.<sup>25</sup> Here the court noted, however, that the measure of evidence required for a gender classification is less clear. The court agreed with the third circuit's holding that intermediate scrutiny requires that evidence be probative but here the court added that probative must be "sufficient as well." 122 F.3d at 895. The Supreme Court in Croson opined that municipalities have a compelling interest in ensuring that public funds do not serve to finance private discrimination. Local governments may be able to take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of private discrimination. Croson at 502.

Subsequent lower court rulings have provided more guidance on passive participation by local governments. In Concrete Works of Colorado Inc. v. The City and County of Denver, 36 F. 3<sup>rd</sup> 1513 (10<sup>th</sup> Cir. 1994), the Tenth Circuit held that it was sufficient for the local government to demonstrate that it was engaging in passive participation in discrimination rather than showing that it actively participated in the discrimination. Thus, the desire for a government entity to prevent the infusion of public funds into a discriminatory industry is enough to satisfy the requirement. As such, if there is evidence that the Commonwealth of Kentucky is infusing public funds into a

---

<sup>24</sup> 122 F.3d 895, 907-08 (11<sup>th</sup> Cir. 1997).

<sup>25</sup> Croson, 488 U.S. at 491-92, 109 S.Ct. at 537-38.

discriminatory industry, this entity has a compelling interest in remedying the effects of such discrimination. However, there must be evidence of exclusion or discriminatory practices by the contractors themselves.

The court in *Concrete Works* stated "neither *Croson* nor its progeny clearly state whether private discrimination that is in no way funded with public tax dollars can, by itself, provide the requisite strong basis in evidence necessary to justify a municipality's affirmative action program... Although we do not read *Croson* as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination, such evidence would at least enhance the municipality's factual predicate for a racial gender conscious program." 36 F.3d 1529.

In *Adarand Construction v. Slater* (Adarand VI) 228 F.3d 1147 (10<sup>th</sup> Cir. 2000), the Tenth Circuit U.S. Court of Appeals addressed the constitutionality of the use in a federal translation program of a subcontractor compensation clause which employed race-conscious presumptions in favor of minority and disadvantaged business enterprises. In addressing the federal government's evidentiary basis to support its findings of discrimination against minorities in the public funded and private construction industry, the court did not read *Croson* as requiring that the municipality identify the exact linkage between its award of public contracts and private discrimination. The Tenth Circuit noted that the earlier *Concrete Works* had not demonstrated the necessary finding of discrimination:

Unlike *Concrete Works*, the evidence presented by the government in the present case demonstrates the existence of two kinds of discriminatory barriers to minority subcontracting enterprises, both of which show a strong link between racial disparities in the federal government's disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination. The first discriminatory barriers are to the formation of qualified minority subcontracting enterprises due to private discrimination, precluding from the outset competition for public construction contracts by minority enterprises. The second discriminatory barriers are to fair competition between minority and non-minority subcontracting enterprises, again due to private discrimination, precluding existing minority firms from effectively competing for public construction contracts. The government also presents further evidence in the form of local disparity studies of

minority subcontracting and studies of local subcontracting markets after the removal of affirmative action programs.<sup>26</sup> Concrete Works at 1529

The federal government's evidence consisted of numerous congressional investigations, hearings, local disparity studies and anecdotal evidence demonstrating discrimination by prime contractors, unions and financial lenders in the private market place. The Court of Appeals concluded that the government's evidence had demonstrated as a matter of law that there was a strong basis in evidence for taking remedial action to remedy the effects of prior and present discrimination. The Court found that Adarand had not met its burden of proof to refute the government's evidence.<sup>27</sup>

Although the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of public funds, the same interest applies to states as well. ("It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice".)<sup>28</sup>

The standard evidence of review of strict scrutiny and the benchmark of strong basis in evidence for the government's conclusion that the evils of racial prejudice need remedying, applies to the federal as well as the state government.

**c. Permissible Evidence**

In Croson, the Court concluded that state and local governments have a compelling interest to remedy identified past and present discrimination within their jurisdiction. Thus, courts have to assess whether a public entity has the requisite factual support for its M/WBE program in order to satisfy the particularized showing of discrimination required by Croson. This factual support can be developed from statistical and anecdotal evidence.

---

<sup>26</sup> 228 F.3d 1147 (Emphasis Added)

<sup>27</sup> Id at 1147, 1176

<sup>28</sup> See Croson 488 U.S. at 492 (citing Norwood v. Harrison 413 U.S. 455)

#### d. Anecdotal Evidence

The majority decision in Croson impliedly endorsed the inclusion of personal accounts of discrimination.<sup>29</sup> However, according to the Croson standard, selective anecdotal evidence about MBE experiences alone would not provide a sufficient and strong enough basis in evidence to demonstrate public or private discrimination in a municipality's construction industry.<sup>30</sup> Nonetheless, personal accounts of actual discrimination or the effects of discriminatory practices may complement empirical evidence. In addition, anecdotal evidence of a governmental entity's institutional practices that provoke discriminatory market conditions are particularly probative. Thus, courts have required the inclusion of anecdotal evidence of past or present discrimination.<sup>31</sup>

In Coral Construction Company v. King County, the Ninth Circuit U.S. Court of Appeals concluded that "the combination of convincing anecdotal and statistical evidence" was potent.<sup>32</sup> Also, the Third Circuit suggested that a combination of empirical and anecdotal evidence was necessary for establishing a prima facie case of discrimination.<sup>33</sup> In addition, the Ninth Circuit approved the combination of statistical and anecdotal evidence used by the City of San Francisco in enacting its M/WBE ordinances.<sup>34</sup>

On the other hand, neither empirical evidence alone, nor selected anecdotal evidence alone provides a strong enough basis in evidence to demonstrate public or private discrimination in a municipality's construction industry to meet the Croson standard.<sup>35</sup> For example, in O'Donnell Construction v. District of Columbia, 963 F.2d 420 (D.C. Cir. 1992), the court reversed the denial of a preliminary injunction for the plaintiff

<sup>29</sup> Croson, 488 U.S. at 480, 109 S.Ct. at 714-15 (noting as a weakness in the City's case that the Richmond City Council heard "no direct evidence of race conscious discrimination on the part of the city in letting contracts or any evidence that the City's prime contractors had discriminated against minority-owned subcontractors").

<sup>30</sup> See Concrete Works, 36 F.3d 1513 (10th Cir. 1994).

<sup>31</sup> See Contractors Assn., 6 F.3d 990, 1002-03 (3rd Cir. 1993) (weighing Philadelphia's anecdotal evidence); Coral Construction Co. v. King County, 941 F.2d 910, 919 (9th Cir. 1991) ("[The combination of convincing anecdotal and statistical evidence is potent]"); Cone Corp. v. Hillsborough County, 908 F.2d 908, 916 (11th Cir. 1990) (supplementing Hillsborough County's statistical evidence with testimony from MBEs who filed complaints to the County about prime contractors' discriminatory practices), cert. denied, 498 U.S. 983, 111 S.Ct. 516, 112 L.Ed.2d 528 (1990); Engineering Contractors, 122 F.3d at 925-26.

<sup>32</sup> 941 F.2d at 919.

<sup>33</sup> Eastern Contractors, 6 F.3d 990, 1003 (3rd Cir. 1993).

<sup>34</sup> Associated General Contractors of California, Inc. v. Coalition for Economic Equity, et al., 950 F.2d 1401 (9th Cir. 1991), cert. denied 503 U.S. 985, 112 S.Ct. 1670, 118 L.Ed. 2d 390 (1992).

<sup>35</sup> Concrete Works, 36 F.3d 1513.

because the District of Columbia failed to prove a "strong basis in evidence" for its MBE program. The Court held in favor of the plaintiff because much of the evidence the District offered in support of its program was anecdotal. The Court opined that "anecdotal evidence is most useful as a supplement to strong statistical evidence--which the Council did not produce in this case".<sup>36</sup>

In Associated General Contractors of America v. City of Columbus, 936 F. Supp 1363 (S.D. Ohio 1996) vacated on other grounds 172 F.3d 411 (6<sup>th</sup> Cir. 1999), the district court stated that the City's investigation was poorly executed for several reasons. According to the Court, no efforts were made to verify reports of discrimination, there was no attempt to determine whether similarly situated majority-owned firms were treated more favorably than M/WBE firms, and political pressures may have clouded the fact finding process. The Court concluded that the anecdotal evidence in that case fell short of proof of pervasive discrimination.

Legally, plaintiffs are entitled to have a government's anecdotal evidence subjected to the test of trial before the court determines whether it actually supports a sound basis in the evidence of discrimination. Associated General Contractors v. the City of Columbus at 1428. Additionally, in Engineering Contractors, the federal district court held that, "we have found that kind of evidence [anecdotal] to be helpful in the past, but only when it was combined with and reinforced by sufficiently probative statistical evidence."<sup>37</sup>

Accordingly, a combination of statistical disparities in the utilization of M/WBEs and particularized anecdotal accounts of discrimination are required to satisfy the factual predicate. Thus, this study has included anecdotal evidence of past and present discrimination in order to establish the factual predicate by these guidelines.

**e. Statistical Data**

Croson additionally held that an inference of discrimination may be made with empirical evidence that demonstrates "a significant statistical disparity between the number of qualified minority contractors . . . and the number of such contractors actually

<sup>36</sup> O'Donnell, 963 F.2d 420, 427 (D.C. Cir. 1992).

<sup>37</sup> 122 F. 3<sup>rd</sup> at 925 (11<sup>th</sup> Cir. 1997).

engaged by the locality or the locality's prime contractors."<sup>38</sup> A governmental action must therefore demonstrate that gross statistical disparities exist between the proportion of MBEs awarded government contracts and the proportion of MBEs in the local industry "willing and able to do the work," in order to justify its use of race conscious contract measures.<sup>39</sup> In order to adequately assess statistical evidence, there must be evidence identifying the basic qualifications of minority contractors "willing and able to do the job" and the Court must determine, based upon these qualifications, the relevant statistical pool with which to make the appropriate statistical comparisons.<sup>40</sup> Subsequent lower court decisions have provided considerable guidelines for statistical analyses sufficient for satisfying the Croson factual predicate. Qualified, willing and able are the pillars of the Croson case. "The relevant question is how to determine who are qualified, willing and able."

Webster v. Fulton County, 51 F. Supp. 2d 1354 (N.D. Ga. 1999), presents a different method in terms of the statistical pool from which quantitative data is collected. In this case, a white male and female plaintiff, owners of a landscaping and tree removal service, the Webster Greenthumb Company, brought suit against the Fulton County's 1994 MFBE Program. The Court analyzed the statistical factual predicate which was developed by Fulton County relying heavily on Croson, and a more recent Eleventh Circuit opinion, Engineering Contractors Association v. Metropolitan Dade County, 122 F.3d. 895 (11<sup>th</sup> Cir. 1997). In Webster the Court indicated that it favored census availability data; however, other courts have made it clear that they believe that the most relevant data is bidder data, that is, data which determines availability based on the number of minority bidders in contrast to the number of majority bidders. The judge also suggests that bid data be analyzed, that is, the total number of bids submitted by all parties divided by the total number of bids submitted by minority firms. See also, George LaNoue, Who Counts? Determining the Availability of Minority Businesses for Public Contracting 21 Harv.3.L. & Pub. Pol. 793. LaNoue writes that although this problem has consumed an enormous volume of resources, no consensus has evolved among scholars or practitioners. "Measuring availability is the key issue in performing a disparity analysis. Despite substantial efforts made by consultants thus far, they have achieved no consensus *above this* measurement."<sup>39</sup>

<sup>38</sup> Croson, 488 U.S. 469, 509, 109 S.Ct. 706, 730.

<sup>39</sup> Ensley Branch, NAACP 31 F3d 1548, 1565 (11<sup>th</sup> Cir. 1994).

<sup>40</sup> 122 F. 3<sup>rd</sup> at 925 (11<sup>th</sup> Cir. 1997).

<sup>39</sup> *Id* at 833

## 1) Availability

The method of calculating M/WBE availability has varied from case to case. In Contractors Association of Eastern Pennsylvania v. City of Philadelphia, 6 F.3d 990 (3<sup>rd</sup> Cir. 1993), the Court stated that available and qualified minority owned businesses comprise the “relevant statistical pool” for purposes of determining availability. The Court permitted availability to be based on the metropolitan statistical area (“MSA”) and local list of the Office of Minority Opportunity; for non-MWBE's, census data. In Associated General Contractors of America v. City of Columbus, 936 F. Supp 1363 (1996), the City’s consultants collected data on the number of M/WBE firms in the Columbus MSA, in order to calculate the percentage of available M/WBE firms. This is referred to as the rate of availability. Three sources were considered to determine the number of M/WBEs “ready willing and able” to perform construction work for the city. None of the measures of availability purported to measure the number of M/WBEs who were qualified and willing to bid as a prime on city construction projects.

The issue of availability was also examined by the Court in Contractors Association of South Florida, Inc., et al v. Metropolitan Dade County, et al, 122 F.3d 895 (11<sup>th</sup> Cir. 1997). Here, the Court opined that when reliance is made upon statistical disparity, and special qualifications are necessary to undertake a particular task, the relevant statistical pool must include only those minorities qualified to provide the requested services. Moreover, these minority firms must be qualified, willing and able to provide the requested services. If the statistical analysis includes the proper pool of eligible minorities, any resulting disparity, in a proper case, may constitute prima facie proof of a pattern or practice of discrimination.

In a recent opinion by the Sixth Circuit in Associated General Contractors v. Drabik, 214 F.3d 730 (6<sup>th</sup> Circuit 2000), the Court of Appeals ruled that the state of Ohio failed to satisfy the strict scrutiny standard to justify the state’s minority business enterprise act, by relying on statistical evidence that did not account for which firms were qualified, willing and able to perform on construction contracts. The court stated that “although Ohio’s most compelling statistical evidence compares the percentage of contracts awarded to minorities to the percentage of minority-owned businesses...the problem is that the percentage of minority-owned businesses in Ohio (7% of 1978) did not take into account which were construction firms and those who were qualified, willing and able to perform on state construction contracts.” Id at 736. Although this



was more data than was submitted in Croson, it was still insufficient under strict scrutiny, according to the court. *Id.*

## **2) Utilization**

Utilization is a natural corollary of availability, in terms of statistical calculation. In City of Columbus, the City's consultants calculated the percentage of City contracting dollars that were paid to M/WBE construction firms. This is referred to as the rate of utilization.

## **3) Disparity Index and Croson**

To demonstrate the under-utilization of M/WBEs in a particular area, parties can employ a statistical device known as the "disparity index".<sup>40</sup> The disparity index is calculated by dividing the percentage of M/WBE participation in government contracts by the percentage of M/WBEs in the relevant population of local firms. A disparity index of one (1) demonstrates full M/WBE participation, whereas the closer the index is to zero, the greater the M/WBE under-utilization. Some courts multiply the disparity index by 100, thereby creating a scale between 0 and 100, with 100 representing full M/WBE utilization.

## **4) Standard Deviation**

The number calculated via the disparity index is then tested for its validity through the application of a standard deviation analysis. Standard deviation analysis measures the probability that a result is a random deviation from the predicted result ( the more standard deviations, the lower the probability the result is a random one.) Social scientists consider a finding of two standard deviations significant, meaning that there is about one chance in 20 that the explanation for the deviation could be random and the deviation must be accounted for by some factor. The Eleventh Circuit has directed that "'where the difference between the expected value and the observed number is greater than

---

<sup>40</sup> See Contractors Assn., 6 F.3d 990, 1005 (3<sup>rd</sup> Cir. 1993) (Third Circuit joining the First, Ninth, and Eleventh Circuits in relying on disparity indices to determine whether a municipality satisfies Croson's evidentiary burden).

two or three standard deviations', then the hypothesis that [employees] were hired without regard to race would be suspect."<sup>41</sup>

## 5) Statistical Regression Analysis

Another issue that arose in the Webster case was that of the statistical significance tests. The court indicated that the test employed in the Engineering Contractors case should be used, wherein two standard deviations or any disparity ratio that was higher than .80 which is insignificant, should be used. The Webster court criticized the Fulton County expert for failing to use a regression analysis to determine the cause of the disparity. The court likewise discredited the post-disparity study for failing to use regression analysis to determine if underutilization was due to firm size or inability to obtain bonding and financing.

The Webster court noted that the court of appeals in Engineering Contractors affirmed the District Court's conclusion that the disparities offered by Dade County's experts in that case were better explained by firm size than discrimination. Dade County had conducted a regression analysis to control for firm size after calculating disparity indices with regard to the utilization of BBEs, HBEs and WBEs in the Dade County market, by comparing the amount of contracts awarded to the amount each group would be expected to receive based on the group's bidding activity and the awardee success rate. Although there were a few unexplained disparities that remained after controlling for firm size, the District Court concluded and the Court of Appeals affirmed that there was no strong basis in evidence for discrimination for BBEs and HBEs and it did not sufficiently demonstrate the existence of discrimination against WBEs in the relevant economic sector. 122 F3d 917. The court noted that finding a single explained negative disparity against BBEs for the years 1989-1991 for a single SIC code was not enough to show discrimination.

The Webster court noted that the Court of Appeals in Engineering Contractors affirmed the District Court's conclusion that the disparities offered by Dade County's experts in that case were better explained by firm size rather than discrimination. Dade County had conducted a regression analysis to control for firm size after calculating

---

<sup>41</sup> Peightal II 26 F.3d 1545, 1556 (11<sup>th</sup> Cir. 1994), quoting Hazelwood, 433 US at 308 n 13, 97 S.Ct 2742 n.13 quoting Castaneda v. Partida, 430 U.S.482, 497,n.17, 97 S.Ct 1272, 1281 n.17, 51LEd 2d 498 (1977).

disparity indexes with regard to the utilization of BBEs, HBEs and WBEs in the Dade County market, by comparing the amount of contracts awarded to the amount it would be expected to receive based on the groups' bidding activity and the awardee success rate. Although there were a few unexplained disparities that remained after controlling for firm size, the District Court concluded and the Court of Appeals affirmed, that there was no strong basis in evidence for discrimination for BBEs and HBEs, and did not sufficiently demonstrate the existence of discrimination against WBEs in the relevant economic sector. 122 F.3d at 917. The court noted that finding a single unexplained negative disparity against BBEs for the years 1989-1991 for a single SIC code was not enough.

Courts have used these M/WBE disparity indices to apply the "strong basis in evidence" standard in Croson. For instance, the Eleventh Circuit held that a 0.11 disparity "clearly constitutes a prima facie case of discrimination indicating that the racial classifications in the County plan were necessary" under Croson.<sup>42</sup> Based on a disparity index of 0.22, the Ninth Circuit upheld the denial of a preliminary injunction to a challenger of the City of San Francisco's MBE plan based upon an equal protection claim.<sup>43</sup> Accordingly, the Third Circuit held that a disparity of 0.04 was "probative of discrimination in City contracting in the Philadelphia construction industry."<sup>44</sup>

#### **f. Geographic Scope of the Data**

The Croson Court observed that because discrimination varies across market areas, state and local governments cannot rely on national statistics of discrimination in the disputed industry to draw conclusions about prevailing market conditions in their respective regions.<sup>45</sup> However, to confine the permissible data to a governmental entity's strict geographical borders would ignore the economic reality that contracts are often awarded to firms located in adjacent areas. Thus, courts closely scrutinize pertinent data related to the jurisdictional area of the state or municipality.

Generally, the scope of the statistical analyses pertains to the geographic market area from which the governmental entity makes most of its purchases. It has been deemed appropriate to examine the existence of discrimination against M/WBEs even

---

<sup>42</sup> Cone Corp., 908 F.2d 908, 916 (11<sup>th</sup> Cir. 1990).

<sup>43</sup> AGC v. Coalition for Economic Equity, 950 F.2d 1401, 1414 (9<sup>th</sup> Cir. 1991).

<sup>44</sup> Contractors Assn. 6 F.3d 990, 1005 (3<sup>rd</sup> Cir. 1993).

<sup>45</sup> Croson, 488 U.S. 469, 504, 109 S.Ct. 706, 727.

when these areas go beyond the political boundaries of the local jurisdictions. In addition, disparities concerning utilization, employment size and formation are also relevant in determining discrimination in a marketplace.

Court decisions have allowed jurisdictions to utilize evidence of discrimination from nearby public entities and from within the relevant private marketplace. Nevertheless, extra-jurisdictional evidence must still pertain to the operation of an industry within geographic boundaries of the jurisdiction.

Accordingly, it can be inferred that the most appropriate and legally defensible scope of empirical data for the Commonwealth of Kentucky is the Commonwealth of Kentucky and multi-state metropolitan areas which include areas that are within the Commonwealth of Kentucky.

**g. Post-Enactment Evidence**

In Croson, the Court stated that a state or local government "must identify that discrimination . . . with some specificity before they may use race-conscious relief."<sup>46</sup> However, the Court declined to require that all relevant evidence of such discrimination be gathered prior to the enactment of the program. Pre-enactment evidence refers to evidence developed prior to a governmental entity enacting a M/WBE program, and could tentatively have been relied upon by the governmental entity in adopting the affirmative action program. Absent any pre-enactment evidence of discrimination, a state or local government would be unable to satisfy Croson. On the other hand, post-enactment evidence is that which has been developed since the affirmative action program was enacted and therefore was not specifically relied upon as a rationale for the government's race and gender conscious efforts. As such, most subsequent rulings have interpreted Croson's evidentiary requirement to include post-enactment evidence.

An exception is West Tennessee Chapter of Associated Builders and Contractors v. Board of Education of the Memphis City Schools, 64 F.Supp.2d 714 (W.D. Tenn 1999). In that case the District Court was faced with the issue of whether "post enactment evidence" is sufficient to establish a strong basis upon which a race conscious program can be supported. The late Judge Jerome Turner opined that although the court

---

<sup>46</sup> Croson, 488 U.S. 469, 504, 109 S.Ct. 706, 727.

in Croson was not faced with the issue of post enactment evidence, much of the language in the opinion suggests that the Court meant to require the governmental entity to develop the evidence before enacting a plan. Furthermore, when evidence of remedial need is not developed until after a racial preference plan is enacted, that evidence provides no insight into the motive of the legislative or administrative body.

The Court concluded that admitting post enactment evidence is contrary to Supreme Court precedent as developed in Wygant, Croson, and Shaw. The Court held that post enactment evidence may not be used to demonstrate that the government's interest in remedying prior discrimination was compelling. It is important to note that this opinion is not representative of the majority of case law on this issue, although it reflects a possible trend that warrants discussion and consideration. It has additional significance because the State of Tennessee is within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as is the Commonwealth of Kentucky.

Associated General Contractors of Ohio v. Sandra Drabik, 50 F.Supp.2d. 741 (1999) is another recent opinion wherein the District Court for the Eastern Division of Ohio stated that in order to support a compelling state interest for race-based preferences, challenged on equal protection grounds, evidence of past discrimination must be reasonably current.

Moreover, the Court ruled that evidence of purported racial discrimination that was more than twenty (20) years old was too remote to form the basis for a compelling governmental interest justifying the enactment of a race-based affirmative action program. This line of reasoning, in terms of the currency of statistical and anecdotal evidence, was fully considered by Griffin & Strong, P.C. while formulating the methodology employed in conducting Kentucky's disparity study.

Early post-Croson decisions permitted the use of post-enactment evidence to determine whether an M/WBE program complies with Croson.<sup>47</sup> In Ensley, the Eleventh Circuit explicitly held that post-enactment evidence is properly introduced in the record and relied upon by district courts in determining the constitutionality of government race and gender-conscious programs:

---

<sup>47</sup> See, e.g. Contractors Assn., 6 F.3d , 990, 1003-04 (3<sup>rd</sup> Cir. 1993); Harrison & Burrows Bridge Constructors, Inc. v. Cuomo, 981 F.2d 50, 60 (2d Cir. 1992); Coral Constr., 941 F.2d 910, 921 (9<sup>th</sup> Cir. 1991).

Although Croson requires that a public employer show strong evidence of discrimination when defending an affirmative action plan, the Supreme Court has never required that, before implementing affirmative action, the employer not have proved that it has discriminated. On the contrary, further finding of discrimination need neither precede nor accompany the adoption of affirmative action.<sup>48</sup>

Therefore, a race and gender-conscious program implemented by the Commonwealth of Kentucky may be supported by post-enactment evidence of discrimination. Moreover, post-enactment evidence is necessary to determine the program's success for narrow tailoring and continued need after the program's initial term has expired. See Associated General Utility Contractors of MD v. Mayor of Baltimore, F Supp. 2d 613, 620 (Post Enactment evidence admissible on the issue of narrow tailoring and the use of race neutral alternatives).<sup>49</sup>

#### **h. Remedies-- Narrowly Tailored**

Under the Croson framework, any affirmative action plan must be narrowly tailored to ameliorate the effects of past discrimination found to justify the use of a race-conscious remedy. Cases subsequent to Croson cases have provided significant guidance on how remedies should be narrowly tailored. The Eleventh Circuit has set forth four considerations in determining whether a plan is narrowly tailored:

- (1) consideration of race neutral alternatives,
- (2) flexibility of plan,
- (3) relationship of plan's numerical goals to relevant market, and
- (4) effect of plan on third parties.<sup>50</sup>

Post-Croson cases have followed the general guidelines listed below in construing the elements of the narrow tailoring prong:

1. Relief is limited to minority groups for which there is identified discrimination;

---

<sup>48</sup> Ensley Branch, NAACP, 31 F.3d 1548, 1565 (11<sup>th</sup> Cir. 1994).

<sup>49</sup> 91 F. 3d at 606

<sup>50</sup> Peightal II, 940 F.2d 1394, 1406 (11th Cir. 1991). See also Engineering Contractors, 122 F3rd 895, 927 (citing Ensley Branch NAACP at 31 F.3<sup>rd</sup> 1548,1569).

2. Remedies are limited to redressing the discrimination within the boundaries of the enacting jurisdiction;
3. The goals of the programs should be flexible and provide waiver provisions;
4. Race and/or gender neutral measures should be considered; and
5. The program should include provisions or mechanisms for periodic review and sunset.

M/WBE programs must be designed so that the benefits of the programs are directed toward those firms that faced discrimination in the local marketplace. To withstand a challenge, relief must extend to those minority groups for which there is evidence of discrimination. M/WBE firms from outside the local market must show that they have unsuccessfully attempted to do business within the local marketplace in order to benefit from the program.

The Sixth Circuit Court of Appeals in Associated General Contractors v. Drabik, affirmed the district court's finding that the State of Ohio's minority business enterprise statute "MBEA" was not narrowly tailored to remedy past discrimination. The court found the statute lacked narrow tailoring because (1) the MBEA suffered from under inclusiveness and over inclusiveness, (lumping together racial and ethnic groups without identified discrimination); (2) lack of a sunset date and thirdly, there was no evidence that Ohio had ever considered race neutral alternatives before adopting the plan to increase minority participation. 214 F.3d 739.

Croson requires that there not only be a strong basis in evidence for a conclusion that there has been discrimination, but also for a conclusion that the particular remedy is made necessary by the discrimination. In other words, there must be a "fit". The Third Circuit, in Contractors Association of Eastern Pennsylvania, approved the District Court's finding that the subcontracting goal program was not narrowly tailored. There was no firm evidentiary basis for believing that non-minority contractors would not hire black subcontractors. Much of the evidence found on the discrimination by the City of Philadelphia was against black "prime contractors" who were capable of bidding on City prime contracts.<sup>51</sup>

---

<sup>51</sup> Contractor's Association of Eastern PA, Inc. v. City of Philadelphia, 91F.3d 586, (3d Cir. 1996)

Court rulings have held that neutral measures must be considered, but not necessarily exhausted, in order for M/WBE programs to be enacted. Moreover, some courts have held that such measures could be enacted concurrently rather than enacted before race or gender-conscious measures. Cases such as Concrete Works, suggest the kinds of neutral measures considered by the courts.

Inherent in the above statements is the notion that M/WBE programs must provide flexibility. Courts have suggested project-by-project goal setting and waiver provisions. Additionally, some courts have indicated that goals need not directly correspond to current availability if there are findings that availability has been adversely affected by past discrimination. Lastly, "review" or "sunset" provisions are necessary components to guarantee that remedies do not out-live their intended remedial purpose.

**i. Burdens of Production and Proof**

The Croson court struck down the City of Richmond's minority set-aside program because the City failed to provide an adequate evidentiary showing of past and present discrimination.<sup>52</sup> Since the Fourteenth Amendment only allows race-conscious programs that narrowly seek to remedy particularized discrimination, the Court held that state and local governments "must identify that discrimination . . . with some specificity before they may use race-conscious relief." The Court's rationale for judging the sufficiency of the City's factual predicate for affirmative action legislation was whether there existed a "strong basis in evidence for its [government's] conclusion that remedial action was necessary."<sup>53</sup>

Croson places the initial burden of production on the state or local governmental actor to demonstrate a "strong basis in evidence" that its race and gender-conscious contract program is aimed at remedying identified past or present discrimination. A state or local affirmative action program that responds to discrimination is sustainable against an equal protection challenge so long as it is based upon strong evidence of discrimination. An inference of discrimination may be made by the locality using empirical evidence that proves a significant statistical disparity between the number of qualified M/WBEs, the number of M/WBE contractors actually contracted by the

<sup>52</sup> Croson, 488 U.S. at 498-506, 109 S.Ct. at 723-28.

<sup>53</sup> Id. at 500, 725 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277, 106 S.Ct. 1842, 1849, 90 L.Ed.2d 260 (1986)).



government, or the entity's prime contractors. Furthermore, the quantum of evidence required for the entity must be determined on a case-by-case basis and in the context and breadth of the M/WBE program it advanced.<sup>54</sup> If the local government is able to do this, then the burden shifts to the challenging party to rebut the municipality's showing.<sup>55</sup>

Once the governmental entity has shown acceptable proof of a compelling interest in remedying past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional.<sup>56</sup>

### **C. Conclusion**

Despite the eleven years of litigation following the Croson decision, the law in the area of race conscious remedies used to ameliorate inequities concerning M/WBE utilization in the area of public contracting, is far from settled. Clearly, the law requires that such programs be reviewed periodically. What remains unclear is the applicable standard used to determine whether a race and gender conscious program has achieved its intended goal of eliminating identified discrimination, thereby negating the need for the continued use of race and gender conscious remedies. In this study, the Griffin & Strong P.C. team analyzed the statistical data as extensively as possible given the limitations of the data maintained by the Commonwealth. We analyzed the data using the more conservative interpretations of availability which have been proffered by the most recent Court opinions. We buttress the quantitative data with an extensive historical analysis and detailed and varied anecdotal evidence. Our findings are presented in the pages which follow.

---

<sup>54</sup> See Concrete Works, 36 F.3d 1513 (10<sup>th</sup> Cir. 1994).

<sup>55</sup> See Contractors v. Philadelphia, 6 F.3d 990, 1007.

<sup>56</sup> Mazeske v. City of Chicago 218 F.3d 820 (7<sup>th</sup> Cir. 2000)

## **II. ANALYSIS OF QUANTITATIVE EVIDENCE**

### **A. Introduction**

This chapter examines the issue of whether or not statistical disparity exists between the availability of Minority and White Female Business Enterprises (M/WFBEs) and their utilization by the Commonwealth of Kentucky. The first section of this chapter deals with the data collection methodology, and the relevant market concepts. The second section provides a framework for the availability concept and discusses how we apply this concept to firms doing business with the Commonwealth of Kentucky. The third section discusses the Commonwealth of Kentucky's contracting history with regard to Minority and White Female Business Enterprises (M/WFBEs) utilization, by procurement categories. The last section is an analysis of disparity between the availability and utilization of M/WFBEs by the Commonwealth of Kentucky. Inference statistics are then presented.

### **➤ Analysis Framework**

#### **1. Data Collection Methodology**

The data collection process was initiated by a series of data assessment meetings with the staffs of each Cabinet. The objective of these meetings was to assess the availability and location of contract files and to obtain contract logs, vendor files, and most current M/WFBE certified lists. Other documents relevant to the statistical analysis were also requested and an assessment of the accessibility of the contract files was determined in order to establish a general approach for data collection.

During the data assessment meetings with officials at each cabinet, requests also were made to provide reports and studies detailing contracting activities. Once the data assessments were completed, a data-gathering plan was developed to provide a framework for the data collection effort.

During these meetings, Griffin & Strong, P.C. explained the data needs and other key pieces of information necessary for the M/WFBE utilization and availability analysis. In addition, an explanation was provided regarding the type of information being sought for Construction and Architecture and Engineering, Commodities and Non Professional Services, and Professional Services. The contract logs, if available, would indicate the project/contract number, the successful bidder(s) and award amount(s), award date and/or notice to proceed date, change orders, and sub-contractor(s)/sub-consultant(s), award amount(s) for each year subdivided by race, ethnicity and gender of the successful bidder firm and subcontractor/sub-consultant firm(s).

Once the data assessment was completed, a data-gathering plan was developed to provide a framework for the data collection effort. A census data collection framework was developed and undertaken for construction and related contracts (Architecture and Engineering), Commodities and Non-Professional Services, and Professional Services let by the Commonwealth of Kentucky from fiscal year 1995 to fiscal year 1999.

## **2. Relevant Market**

The theory that the relevant market area should encompass seventy-five to eighty-five percent of the "qualified" vendors that service a particular sector has its origins in antitrust lawsuits.<sup>57</sup> In line with antitrust precepts, Justice O'Connor writing for the majority, specifically criticized the City of Richmond, Virginia for making MBEs all over the country eligible to participate in its set-aside program.<sup>58</sup> The Court reasoned that a mere statistical disparity between the overall minority population in Richmond, Virginia (50% African American) and the award of prime contracts to minority-owned firms (0.67% to African American firms) was an irrelevant statistical comparison. The Court also maintained that this comparison was insufficient to raise an inference of discrimination.

Justice O'Connor opined that the relevant statistical comparison is one between the percentage of minority business enterprises in the marketplace who were qualified to perform contracting work (including prime and sub-contractors) and the percentage of

---

<sup>57</sup> D. Burman, "Predicate Studies: The Seattle Model," Tab E of 11-12 Minority and Women Business Programs Revisited (ABA Section of Public Contract law, Oct. 1990)

<sup>58</sup> Croson, 488 U.S. at 506

total City contracting dollars awarded to minority firms. Unfortunately, the Court's opinion only gave general guidance as to how the actual availability and utilization of minority firms should be determined.

Subsequent to Croson, a number of court decisions have attempted to flesh out exactly what type of quantitative evidence is required in order to determine if there is a significant statistical inference of discrimination. One of the most common themes of recent court decisions is that "available" firms must have the "qualifications" to perform work for a local jurisdiction. That is, firms must meet requisite qualifications in order to be considered as "available" firms.

In addition to the aforementioned stipulations, in the Croson decision the Supreme Court further emphasized the need to provide evidence of discrimination within a specific geographic area. This geographic benchmark was put into place to acknowledge that, "the scope of the problem would vary from market to market."

In general, there are two methods used to determine the "relevant market". The first method consists of ascertaining awardees' and vendors locations, and establishing the dollars spent by an institution for services to be performed. In the second method, an institution's bidders' or vendors' lists are scrutinized to ascertain their geographic location. The former has gained more acceptance under the United States Justice Department's guidelines for defining relevant markets. This is especially true in antitrust and merger cases. Some consultants have modified these two methods and developed an alternative method for determining an agency's relevant market using the prime contractor or awardees lists, the vendor lists, and the bidder lists.

In this study, the relevant market is divided into three geographic groups, namely:

- the Commonwealth of Kentucky;
- the contiguous states (Ohio, Indiana, Missouri, Illinois, West Virginia, Virginia, North Carolina); and,
- the United States (outside Kentucky and the contiguous States).

Establishing the relevant market is by way of one of the following:

- 1) the area where 85% or more of the qualified vendors are located, or
- 2) the area where 85% or more of the awardees are located; or
- 3) the area where 85% or more of the bidders are located.

Ideally, the application of these three criteria results in a unique relevant market designation. In cases where this does not occur, however, criterion three, the area where 85% or more of the bidders are located, is given greater weight. That is because this criterion more accurately reflects the spirit of the Supreme Court's test which asserts that qualified firms (bidders) in the area be ready, willing and able to do business with various institutions. In other words, when the relevant market is the same for the awardees, the vendors and the bidders for a procurement category, the decision to choose is easy. When there is a difference, the bidders are given more weight because the rule of thumb used by economists and researchers is to determine the relevant geographical area in which a vast majority of the offerers or sellers to the relevant buyer (each individual agency) are located. It follows that different relevant markets may need to be considered for different types of procurement categories.

For each procurement category, and for each discrete list, the contractors were grouped starting with the Commonwealth of Kentucky and the contiguous states until 85 percent of the contractors were located in a specific area.

In this study, this consultant analyzed the relevant market for awardees, vendors and bidders. The analyses of these constituents were conducted for the following procurement categories:

- Construction;
- Architecture and Engineering (A/E);
- Commodities and Non-Professional Services; and
- Professional Services.

The relevant market for A/E related to capital construction is the Commonwealth of Kentucky. At least 85 percent of the awardees are located in the Commonwealth of Kentucky. For A/E, 89.47 percent of the bidders and 94.47 percent of the awardees are located in the Commonwealth of Kentucky, 3.41 percent are located in the State of Ohio, 0.93 percent are located in the State of Indiana, and 0.31 percent of the bidders are

located in the State of Illinois. In other words only 3.34 percent of the A/E bidders are located in the states contiguous to Kentucky.

Based on the rule of decision, for general construction (capital construction), the relevant market is the Commonwealth of Kentucky and its contiguous states. Following the same rule, the relevant market for Commodities and Non Professional Services contracts let by the Finance and Administration Cabinet is the Commonwealth of Kentucky and its contiguous states, the relevant market for Commodities and Non Professional Services contracts let by the Transportation Cabinet is the Commonwealth of Kentucky and its contiguous states; and the relevant market for construction done through the Transportation Cabinet is the Commonwealth of Kentucky and its contiguous states.

**Table 1**  
**The Commonwealth of Kentucky**  
**RELEVANT MARKET ANALYSIS**

	A/E (CAPITAL CONSTRUCTION RELATED)	CONSTRUCTION (CAPITAL CONSTRUCTION)	CONSTRUCTION THROUGH TRANSPORTATION	COMMODITIES AND NON PROFESSIONAL SERVICES (THROUGH TRANSPORTATION AND FINANCE)
<b>Awardees</b>	Commonwealth of Kentucky	Commonwealth of Kentucky and contiguous states	Commonwealth of Kentucky and contiguous states	Commonwealth of Kentucky and contiguous states
<b>Bidders</b>	Commonwealth of Kentucky	Commonwealth of Kentucky and contiguous states	Commonwealth of Kentucky and contiguous states	Commonwealth of Kentucky and contiguous states

Source: Griffin & Strong, P.C.

## **B. Availability Estimates**

### **1. Methodology for Availability Analysis**

Croson and subsequent decisions give only general guidance as to how to measure availability. Instead, court decisions are more specific and instructive on what not to use to estimate availability, such as measures which emphasize the size of firms. One common theme from the court decisions is that "qualification" to perform work for a local jurisdiction is one of the key indices of an "available" firm.

The determination of the availability of businesses for public contracting is crucial to an effective disparity study. If availability is miscalculated, then all inference statistics, including disparity indices (or disparity ratios), will be in error.<sup>59</sup>

There are different approaches to measuring available, qualified firms. Among the different approaches to measuring availability, this consultant uses a very narrow definition of availability. It is one that counts those firms that have demonstrated that they have attempted to do business with each of the agencies. This measure of availability has been developed by gathering each agency's bidders' list for construction and related contracts, architecture and engineering, commodities and non professional services covering the study period for each agency for those contracts found and reviewed, and thus included in the utilization data. The narrow measure of availability utilized in this study incorporates all the required criteria of availability, more specifically:

- The bidder does business within an industry group from which the agencies make certain purchases.
- The firm's owner has demonstrated that he or she believes the firm is qualified and able to perform the work, and is located within the relevant geographical area, such that it can do business with the agencies.
- By the owner's actions, he or she has demonstrated an interest in obtaining work from the agencies.

By definition, a measure of availability is a benchmark to examine whether there are any disparities in the utilization of minority and female business enterprises in the market place. A highly cautious approach would be to rely on only the narrowest, most restrictive definitions; however, the narrowest measure might be influenced by the very patterns of discrimination intended to be investigated through a comparison of utilization and availability.<sup>60</sup>

---

<sup>59</sup> La Noue, George R., "Standards for the Second Generation of Croson - Inspired Disparity Studies", The Urban Lawyer (The National Quarterly on State and Local Government Law), Summer 1994, Volume 26, No 3, p. 490

<sup>60</sup> BBC Research and Consulting, Pima County Disparity Study, June 1994 p. v-3

The approach we have taken for measuring availability is conservative and it is highly likely that actual availability has been suppressed based upon patterns of discrimination in the relevant geographical marketplace.

A list of bidders from the contracts reviewed was compiled into a database, including therein their ethnicity, gender, race, city, and state and procurement categories. A discrete list was then developed from this database by procurement type and the ethnicity, gender, and race were properly identified.

For each procurement category, the availability was estimated by dividing the total of each M/WFBE group by the total of all discrete bidders.

The following definitions are necessary for the availability estimation.

Let     $A$         = Availability Estimates  
       $A = (\text{Asian})$         = Availability Estimates for Asian Business Enterprises  
       $N = (\text{Asian})$         = Number of Asian Business Enterprises in the pool  
       $N = (\text{M/WFBE})$         = Number of Minority Owned Business Enterprises  
       $N = (t)$                 = Total number of businesses in the pool of bidders in the  
   procurement category (i.e. construction).

Availability ( $A$ ) is found by dividing the number of minority and/or women owned business enterprises by the total number of businesses in the pool of bidders. For instance, availability for Asian is  $A(\text{Asian}) = N(\text{Asian})/N(t)$  and availability for M/WBE is  $N(\text{M/WFBE})/N(t)$ .

An availability estimation has been conducted for each procurement category by ethnicity, race, and gender using bid tabulations and 1997 census data. The census data are derived from the 1997 Economic Census of Minority and Women-Owned firms.



**Table 2**  
**The Commonwealth of Kentucky**  
**AVAILABILITY ESTIMATE BASED ON THE POOL OF BIDDERS**  
**BY**  
**PROCUREMENT CATEGORY**  
**(%)**

<b>Procurement Category/Source of Bid File</b>	<b>Asian</b>	<b>African American</b>	<b>Hispanic</b>	<b>Native American</b>	<b>White Women</b>	<b>Unidentified Minorities</b>	<b>MAJORITY</b>
A/E (Capital Construction)	0.00	0.00	0.00	0.00	0.00	0.00	100.00
Construction (Capital Construction)	0.05	0.15	0.20	0.00	0.87	0.10	98.63
Commodities and Non Prof. Services. (Finance and Administration)	0.02	0.00	0.00	0.00	6.45	1.76	91.77
Commodities and Non Prof. Services. (Transportation)	0.00	0.08	0.00	0.00	1.19	0.39	98.32
Professional Services (Transportation)	N/A	N/A	N/A	N/A	N/A	N/A	N/A

Source: Griffin &amp; Strong, P.C.

**Table 3**  
**The Commonwealth of Kentucky**  
**AVAILABILITY ESTIMATE BASED ON CENSUS DATA**  
**BY**  
**PROCUREMENT CATEGORY**  
**(%)**

<b>Procurement Category/Source of Bid File</b>	<b>Asian</b>	<b>African American</b>	<b>Hispanic</b>	<b>Native American</b>	<b>Women</b>
Construction	0.06	0.87	0.33	0.57	7.52
Goods (Commodities) & Non Professional Services.	0.36	0.32	0.09	0.11	9.98
Professional Services	1.13	0.99	0.38	0.14	17.97

Source: Griffin &amp; Strong, P.C.

Note: 1) Availability Estimates based on the 1997 U.S. Census Bureau's Economic Census of Minority and Women-Owned firms.

2) Women are females of any race group.

### C. Contracting Activity

The result of the data collection, verification and validation effort was the development of a database of contracting history for each procurement type and each agency. The gathering of historical data, especially for subcontracting information, poses unique challenges for consultants engaged in disparity studies because of the differences in record keeping among various agencies. Within limitations of the data, however, Griffin & Strong, P.C. is confident that the contract data log developed based on a census of the data from the actual contract files reflects the contracting history of minorities and white female business enterprises by the Commonwealth of Kentucky. The data reviewed, collected, and presented for each agency is the basis for the utilization analysis in this study.

Cross tabulations of the data by (1) procurement categories (Construction, Architecture and Engineering, Professional Services Commodities and Non Professional Services) and by (2) Ethnicity, Gender and Race, provide the data disaggregation necessary to compute the utilization percentages and disparity indices by comparing utilization against the availability of minorities and white female business enterprises (M/WFBEs).

In a recent opinion by the Sixth Circuit in Associated General Contractors v. Drabik, 214 F.3d 730 (6<sup>th</sup> Cir. 2000), the Court of Appeals ruled that the state of Ohio failed to satisfy the strict scrutiny standard to justify the state's minority business enterprise act, by relying on statistical evidence that did not account for which firms were qualified, willing and able to perform on construction contracts. The court stated that "although Ohio's most compelling statistical evidence compares the percentage of contracts awarded to minorities to the percentage of minority owned businesses, it did not take into account which were construction firms and those who were qualified, willing and able to perform on state construction contracts" Although this was more data than was submitted in Croson, it was still insufficient under strict scrutiny, according to the court. Id.

#### **D. Utilization Analysis**

In this section, the summary of the total dollars reviewed for each agency will be broken out by procurement category, fiscal year, ethnicity, gender, and race. The analysis shows data on universal prime contractors and subcontractors (or sub-consultants) by fiscal year and by procurement categories. For each procurement category, utilization data for prime contractors and subcontractors are combined in a table which gives the total minority and female business enterprise award amount by fiscal year.

The last part of the utilization analysis consists of converting the total utilization into percentages for each M/WFBE group per fiscal year.

#### **E. Data Limitations**

The utilization analysis of M/WFBEs by the Commonwealth of Kentucky does not include their utilization as sub-contractors or sub-consultants. The utilization and the disparity indices analysis involve only prime contractors or successful bidders.

##### ***Missing Subcontract Dollars***

*Griffin & Strong, P.C. was unable to secure subcontracting/sub-consulting dollars from the actual contract files during the data collection effort, simply because the contract files do not contain the data relative to sub-contracting or sub-consulting activities. This consultant collected subcontractor names from the actual files and developed a subcontractor database that was electronically cross-referenced with the minority vendors database. The files did not contain dollar amounts for minority/women subcontractors or sub-consultants, indicating that this piece of information was not captured during the Study Period. This figure is striking in that smaller sub-contracting opportunities are often where much of the utilization of M/WBEs is found. These contracts are also crucial for developing smaller firms into larger firms.*

## **1. Construction Utilization**

The analysis of the aggregate construction and all construction sub-groups include only prime award data because M/WFBE sub-contracting or sub-consulting data are unavailable for the reasons explained earlier. Construction in this section comprises Capital Construction contracts and construction contracts let through the Transportation Cabinet. Tables 4 and 5 show aggregate construction utilization and include only prime contract dollars. Tables 6 and 7 show construction dollars let through Transportation.

### **a. Capital Construction**

During the study period, capital construction awards amounted to \$283.39 million. Minorities and White Female Business Enterprises (M/WFBEs) were awarded \$4.471 million or 1.58 percent of the total dollars reviewed from fiscal year 1995 through fiscal year 1999. Their participation rates ranged from a low of 0.13 percent in 1998 to a high of 5.17 percent in 1999.

African American and Hispanic firms were the most successful minority groups with regard to award of construction prime contracts during the study period, although their level of participation was very small relative to the amount of contracts awarded by the Commonwealth of Kentucky.

African American Business Enterprises received 0.80 percent of the total dollars let by the Commonwealth of Kentucky through Capital Construction during the study period. Women-firms were successful in being awarded only 0.08 percent of the total dollars awarded by Kentucky.

Asian Business Enterprises and Native American firms were not successful in being awarded prime construction contracts during the entire study period.

**Table 4**

**The Commonwealth of Kentucky  
M/WFBE UTILIZATION IN CONSTRUCTION  
(Capital Construction) Analysis by Dollars Received  
(\$)**

FISCAL YEAR	TOTAL \$	M/WFBE	ASIAN	AFRICAN AMERICAN	HISPANIC	NATIVE AMERICAN	WHITE FEMALE	UNID. M/WFBEs	MAJORITY
1995	31,240,220	50,300	0	24,800	0	0	25,500		31,189,920
1996	41,543,531	1,418,440	0	688,166	566,524	0	2,950		40,125,091
1997	68,504,177	350,334	0	0	0	0	0		68,153,821
1998	93,108,391	120,000	0	120,000	0	0	0		92,988,391
1999	48,991,5283	2,532,804	0	1,428,633	878,600	0	202,671		46,458,724
<b>TOTAL</b>	<b>283,387,847</b>	<b>4,471,878</b>	<b>0</b>	<b>2,261,599</b>	<b>1,445,124</b>	<b>0</b>	<b>231,121</b>		<b>278,915,946</b>

Source: Griffin &amp; Strong, P.C.

**Table 5  
The Commonwealth of Kentucky  
M/WFBE UTILIZATION IN CONSTRUCTION  
Analysis by Percentage  
(%)**

FISCAL YEAR	TOTAL %	M/WFBE	ASIAN	AFRICAN AMERICAN	HISPANIC	NATIVE AMERICAN	WHITE FEMALE	UNID. M/WFBE
1995	31,240,220	0.16	0.00	0.08	0.00	0.00	0.08	0.00
1996	41,543,531	3.41	0.00	1.66	1.36	0.00	0.01	0.39
1997	68,504,177	0.51	0.00	0.00	0.00	0.00	0.00	0.51
1998	93,108,391	0.13	0.00	0.13	0.00	0.00	0.00	0.00
1999	48,991,5283	5.17	0.00	2.92	1.79	0.00	0.41	0.05
<b>TOTAL</b>	<b>283,387,847</b>	<b>1.58</b>	<b>0.00</b>	<b>0.80</b>	<b>0.51</b>	<b>0.00</b>	<b>0.08</b>	<b>0.192</b>

Source: Griffin &amp; Strong, P.C.

**b. Transportation Construction**

M/WFBE participation in prime construction for the Department of Transportation is displayed in Table 6 and converted into percentages in Table 7.

Minorities and White Female Business Enterprises were awarded \$119.724 million in construction. This amount represents 4.14 percent of the \$2.893 billion let in construction during the study period.

Asian Business Enterprises and White Female firms were most successful in getting prime contracts in construction from the Department of Transportation during the study period. They received \$32.846 million (1.14%) and \$85.747 million (2.96%) in prime contracts, respectively.

African American firms and Hispanic businesses were less successful in receiving construction prime contracts. They received \$493,954 (.02%) and \$636,161 (.02%), respectively.

**Table 6**  
**The Commonwealth of Kentucky**  
**M/WFBE UTILIZATION IN CONSTRUCTION**  
**TRANSPORTATION CONSTRUCTION**  
**(\$)**

FISCAL YEAR	TOTAL \$	M/WFBE	ASIAN	AFRICAN AMERICAN	HISPANIC	NATIVE AMERICAN	WHITE FEMALE	UNID. MBEs	MAJORITY
1995	569,594,971	33,868,491	12,291,172	192,045	0	0	21,358,274	0	535,725,479
1996	530,296,788	5,884,179	2,234,212	0	0	0	3,649,967	0	524,412,609
1997	483,268,925	36,970,353	7,728,536	78,450	0	0	29,163,367	0	446,298,573
1998	621,717,229	32,073,697	9,813,934	0	636,161	0	21,623,602	0	589,643,533
1999	688,136,863	10,926,970	778,722	223,459	0	0	9,924,789	0	677,209,893
<b>TOTAL</b>	<b>2,893,014,776</b>	<b>119,723,690</b>	<b>32,846,575</b>	<b>493,954</b>	<b>636,161</b>	<b>0</b>	<b>85,747,000</b>		<b>2,773,290,087</b>

Source: Griffin & Strong, P.C.

**Table 7**  
**The Commonwealth of Kentucky**  
**M/WFBE UTILIZATION IN CONSTRUCTION**  
**TRANSPORTATION CONSTRUCTION**  
**(%)**

FISCAL YEAR	TOTAL \$	M/WFBE	ASIAN	AFRICAN AMERICAN	HISPANIC	NATIVE AMERICAN	WHITE FEMALE
1995	569,594,971	5.95	2.16	0.03	0.00	0.00	3.75

1996	530,296,788	1.11	0.42	0.00	0.00	0.00	0.69
1997	483,268,925	7.65	1.60	0.02	0.00	0.00	6.03
1998	621,717,229	5.16	1.58	0.00	0.10	0.00	3.48
1999	688,136,863	1.59	0.11	0.03	0.00	0.00	1.44
<b>TOTAL</b>	<b>2,893,014,776</b>	<b>4.14</b>	<b>1.14</b>	<b>0.02</b>	<b>0.02</b>	<b>0.00</b>	<b>2.96</b>

Source: Griffin &amp; Strong, P.C.

## 2. Minorities and White Female Business Enterprises (M/WFBE)

### Utilization in Architecture and Engineering (A/E)

M/WFBE participation at the prime level in Architecture and Engineering is displayed in Table 8 and converted into percentages in Table 9.

The total dollars awarded in Architecture and Engineering amounted to \$24,657,836 from 1995 to 1999.

Minorities and White Female Business Enterprises were awarded a little over forty thousand dollars. Their total utilization amounted to \$41,657 or 0.17 percent of the total dollars let by the Commonwealth of Kentucky during the study period in this category.

Asian, Hispanic, and White Female-owned firms were **not** utilized in A/E during the entire study period.

African American Business Enterprises were the only minority group that experienced participation in this procurement category at the prime contracting level with a rate of 17 percent of the total award dollars let by the Commonwealth of Kentucky during the study period.

**Table 8**  
**The Commonwealth of Kentucky**  
**M/WFBE UTILIZATION IN ARCHITECTURE AND ENGINEERING**  
**CAPITAL CONSTRUCTION RELATED A/Es**  
**(\$)**

FISCAL YEAR	TOTAL \$	M/WFBE	ASIAN	AFRICAN AMERICAN	HISPANIC	NATIVE AMERICAN	WHITE FEMALE	MAJORITY
-------------	----------	--------	-------	------------------	----------	-----------------	--------------	----------

1995	2,813,313	0	0	0	0	0	0	2,813,313
1996	3,259,603	13,200	0	13,200	0	0	0	3,246,403
1997	7,259,446	28,457	0	28,457	0	0	0	7,230,989
1998	1,430,823	0	0	0	0	0	0	1,430,823
1999	9,894,651	0	0	0	0	0	0	9,894,651
<b>TOTAL</b>	<b>24,657,836</b>	<b>41,657</b>	<b>0</b>	<b>41,657</b>	<b>0</b>	<b>00</b>	<b>0</b>	<b>24,616,179</b>

Source: Griffin &amp; Strong, P.C.



**Table 9**  
**The Commonwealth of Kentucky**  
**M/WFBE UTILIZATION IN A/E**  
**CAPITAL CONSTRUCTION RELATED A/ES**  
**(%)**

FISCAL YEAR	TOTAL \$	M/WFBE	ASIAN	AFRICAN AMERICAN	HISPANIC	NATIVE AMERICAN	WHITE FEMALE
1995	2,813,313	0.00	0.00	0.03	0.00	0.00	0.00
1996	3,259,603	0.40	0.00	0.40	0.00	0.00	0.00
1997	7,259,446	0.39	0.00	0.39	0.00	0.00	0.00
1998	1,430,823	0.00	0.00	0.00	0.00	0.00	0.00
1999	9,894,651	0.00	0.00	0.00	0.00	0.00	0.00
<b>TOTAL</b>	<b>24,657,836</b>	<b>0.17</b>	<b>0.00</b>	<b>0.17</b>	<b>0.00</b>	<b>0.00</b>	<b>0.00</b>

Source: Griffin & Strong, P.C.

### 3. Minorities and White Female Business Enterprises (M/WFBE) Utilization in Professional Services

Table 10 depicts the Minority and White Female Business Enterprises' participation in Professional Services at the prime contracting level. The prime contracting utilization is converted into percentages in Table 11. The total in professional services amounted to 127.113 million during the study period.

Minorities and White Female Business Enterprises received \$6.373 million or 5.01 percent of the total dollars awarded in this procurement category during the entire study period.

Asian and White Female firms were the only minority groups successful in being awarded professional services contracts. They were awarded 1.10 percent and 3.92 percent, respectively, of the total dollars spent by the Commonwealth of Kentucky in this procurement category.

**Table 10**  
**The Commonwealth of Kentucky**  
**M/WFBE UTILIZATION IN PROFESSIONAL SERVICES**  
**Professional Services let by Transportation**  
**(\$)**

FISCAL YEAR	TOTAL \$	M/WFBE	ASIAN	AFRICAN AMERICAN	HISPANIC	NATIVE AMERICAN	WHITE FEMALE	MAJORITY
1995	9,237,702	469,909	0	0	0	0	469,909	8,767,793
1996	6,382,473	667,109	0	0	0	0	667,109	5,715,364
1997	39,711,656	3,151,579	548,800	0	0	0	2,602,779	36,560,077
1998	34,918,423	930,075	360,968	0	0	0	569,107	33,988,348
1999	36,863,081	1,155,257	482,236	0	0	0	673,021	35,707,823
<b>TOTAL</b>	<b>127,113,335</b>	<b>6,373,929</b>	<b>1,392,004</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>4,981,925</b>	<b>120,739,405</b>

Source: Griffin &amp; Strong, P.C.

**Table 11**  
**The Commonwealth of Kentucky**  
**M/WFBE UTILIZATION IN PROFESSIONAL SERVICES**  
**Professional Services let by Transportation**  
**(%)**

FISCAL YEAR	TOTAL \$	M/WFBE	ASIAN	AFRICAN AMERICAN	HISPANIC	NATIVE AMERICAN	WHITE FEMALE
1995	9,237,702	5.09	0.00	0.03	0.00	0.00	5.09
1996	6,382,473	10.45	0.00	0.00	0.00	0.00	10.45
1997	39,711,656	7.94	1.38	0.00	0.00	0.00	6.55
1998	34,918,423	2.66	1.03	0.00	0.00	0.00	1.63
1999	36,863,081	3.13	1.31	0.00	0.00	0.00	1.83
<b>TOTAL</b>	<b>127,113,335</b>	<b>5.01</b>	<b>1.10</b>	<b>0.00</b>	<b>0.00</b>	<b>0.00</b>	<b>3.92</b>

Source: Griffin &amp; Strong, P.C.

➤ **Minorities and White Female Business Enterprises (M/WFBE) Utilization in Commodities and Non Professional Services**

**a. Commodities and Non Professional Services through Finance and Administration**

The award dollars reviewed and collected by Griffin & Strong, P.C. in Commodities and Non Professional Services are displayed in Table 12 for prime contracting activity. These amounts are converted into percentages in Table 13.

The total dollars spent in commodities and non-professional services during the study period through Finance and Administration amounted to \$702.815 million.

Minorities and White Female businesses received 5.56 percent of the total amount spent in this procurement category.

White Female firms received 3.16 percent of commodities and non-professional services purchases made through Finance and Administration during the study period. More than \$15 million (\$16.814 million or 2.39 percent of the total amount) went to minorities whose ethnicity, race and gender could not be identified.

**Table 12**

**The Commonwealth of Kentucky  
M/WFBE UTILIZATION IN COMMODITIES AND NON-PROFESSIONAL SERVICES  
Purchases made through Finance and Administration  
(\$)**

FISCAL YEAR	TOTAL \$	M/WFBE	ASIAN	AFRICAN AMERICAN	HISPANIC	NATIVE AMERICAN	WHITE FEMALE	UNID. MBEs	MAJORITY
1995	101,344,853	15,308,085	0	0	0	0	11,158,344	4,149,741	86,036,768
1996	244,647,997	13,493,390	0	0	0	0	2,679,876	10,813,514	231,154,607
1997	142,188,891	7,467,522	0	0	0	0	7,013,481	454,041	134,721,369
1998	84,718,399	1,082,290	0	0	0	0	609,506	472,784	83,636,110
1999	129,915,678	1,706,622	0	0	0	0	782,578	924,044	128,209,056
<b>TOTAL</b>	<b>702,815,819</b>	<b>39,057,908</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>22,243,785</b>	<b>16,814,123</b>	<b>663,757,910</b>

Source: Griffin & Strong, P.C.

**Table 13**  
**The Commonwealth of Kentucky**  
**M/WFBE UTILIZATION IN COMMODITIES AND NON-PROFESSIONAL SERVICES**  
**Purchases made through Finance and Administration**

(%)

FISCAL YEAR	TOTAL \$	M/WFBE	ASIAN	AFRICAN AMERICAN	HISPANIC	NATIVE AMERICAN	WHITE FEMALE	UNID. MBEs
1995	101,344,853	15.10	0.00	0.00	0.00	0.00	11.01	4.09
1996	244,647,997	5.52	0.00	0.00	0.00	0.00	1.10	4.42
1997	142,188,891	5.25	0.00	0.00	0.00	0.00	4.93	0.32
1998	84,718,399	1.28	0.00	0.00	0.00	0.00	0.72	0.56
1999	129,915,678	1.31	0.00	0.00	0.00	0.00	0.601	0.71
<b>TOTAL</b>	<b>702,815,819</b>	<b>5.56</b>	<b>0.00</b>	<b>0.00</b>	<b>0.00</b>	<b>0.00</b>	<b>3.16</b>	<b>2.39</b>

Source: Griffin & Strong, P.C.

#### **4. Commodities and Non Professional Services through Transportation**

M/WFBE participation in Commodities and Non Professional Services is displayed in Table 14 and converted into percentages in Table 15.

Commodities and Non Professional Services purchases made through the Transportation Cabinet that were reviewed and collected by this consultant totaled \$55.737 million from FY 95 to FY 99.

Minorities and White Female Business Enterprises' utilization amounted to only \$689,191.00. This participation level represents 1.24 percent of the total award dollars spent through the Transportation Cabinet during the study period.

Purchases in the amount of \$4,884 (or 0.01 percent of total purchases) were made during the study period from Minority Business Enterprises (MBEs) whose ethnicity, race, and gender could not be determined.

Table 14

**M/WFBE UTILIZATION IN COMMODITIES AND NON-PROFESSIONAL SERVICES**  
**Purchases made through Transportation**  
**(\$)**

FISCAL YEAR	TOTAL \$	M/WFBE	ASIAN	AFRICAN AMERICAN	HISPANIC	NATIVE AMERICAN	WHITE FEMALE	UNID. MBEs	MAJORITY
1995	31,059,366	625,998	0	0	0	0	622,690	3,308	30,433,367
1996	1,729,328	22,542	0	0	0	0	22,542	0	1,706,786
1997	1,057,491	0	0	0	0	0	0	0	1,057,491
1998	10,796,325	28,583	0	0	0	0	27,008	1,576	10,767,742
1999	11,094,825	12,068	0	120	0	0	11,948	0	11,082,757
<b>TOTAL</b>	<b>55,737,335</b>	<b>689,191</b>	<b>0</b>	<b>120</b>	<b>0</b>	<b>0</b>	<b>684,188</b>	<b>4,884</b>	<b>55,048,142</b>

Source: Griffin &amp; Strong, P.C.

Table 15

**The Commonwealth of Kentucky**  
**M/WFBE UTILIZATION IN COMMODITIES AND NON-PROFESSIONAL SERVICES**  
**Purchases made through Transportation**  
**(%)**

FISCAL YEAR	TOTAL \$	M/WFBE	ASIAN	AFRICAN AMERICAN	HISPANIC	NATIVE AMERICAN	WHITE FEMALE	UNID. MBEs
1995	31,059,366	2.02	0.00	0.00	0.00	0.00	2.00	0.01
1996	1,729,328	1.30	0.00	0.00	0.00	0.00	1.30	0.00
1997	1,057,491	0.00	0.00	0.00	0.00	0.00	0.00	0.00
1998	10,796,325	0.26	0.00	0.00	0.00	0.00	0.25	0.01
1999	11,094,825	0.11	0.00	0.00	0.00	0.00	0.11	0.00
<b>TOTAL</b>	<b>55,737,335</b>	<b>1.24</b>	<b>0.00</b>	<b>0.00</b>	<b>0.00</b>	<b>0.00</b>	<b>1.23</b>	<b>0.01</b>

Source: Griffin &amp; Strong, P.C.

➤ **SMALL PURCHASES THROUGH FINANCE AND ADMINISTRATION**

Several of the cabinets of the Commonwealth of Kentucky make their small purchases (\$20,000 or less) through Finance and Administration. Some of the cabinets making their purchases through Finance and Administration are:

- Justice
- Human Resources
- Natural Resources
- Education
- Cabinet for Health Services
- Tourism

The data collected by this consultant show that the Transportation Cabinet is the only agency that makes significant purchases of commodities and non-professional services for itself, and maintains data in sufficient form for retrieval or collection for the scope of this study.

#### **E. Disparity Indices**

This section of the study discusses the disparity analysis and answers the crucial question of whether or not there is disparity between the utilization of Minorities and White Female Business Enterprises (M/WFBEs) and their availability in the market place, for the Commonwealth of Kentucky.

One way of answering this question is to compare the M/WFBE utilization percentages and their availability percentage in the relevant geographic area. The disparity is measured by using a concept called "disparity index" (DI). The DI is defined as the ratio of the percentage of Minority and Women Business Enterprises' (M/WFBE) utilization (U) divided by their percentage in the market place or availability A

Let: U = Utilization percentage for the M/WFBE group.

A = Availability percentage for the M/WFBE group.

DI = Disparity Index for the M/WFBE group.

DI =  $U/A$  (Utilization divided by Availability).

When the DI is 1, or the utilization percentage equals the availability percentage, there is parity; or, put another way, there is no disparity.

In situations where there is availability, but no utilization, the corresponding disparity index is zero. In cases where there is utilization but no availability, the resultant disparity index is designated by the symbol " $\infty$ " (infinity). Finally, in cases where there is no utilization and no availability, the corresponding disparity index is undefined (division of zero by zero) and designated by a dash (-).

The disparity index analysis is carried out for each procurement category included in this study. The disparity index calculations in this study are based on availability estimates derived from the bidders' list.

➤ **Minorities and White Female Business Enterprises (M/WFBE) Disparities in Construction**

**a. Capital Construction**

**1. Analysis of Disparity Indices using availability estimates derived from bid data**

The disparity indices for capital construction are displayed in Table 16. The availability estimates used for their calculation are based on the pool of bidders.

For M/WFBEs, the disparity indices in construction range from 0.09 to 3.77 during the study period. A typical disparity index for Minority and White Female Business Enterprises from FY 1995 to FY 1999 was 1.37, indicating an over-utilization of these firms in construction. M/WFBEs' overall disparity index for the study period is 1.15, indicating an over-utilization.

Native American firms' participation in construction during the study period resulted in undefined disparity indices. This situation indicates that this minority group was not utilized during the study period.

Asian Business Enterprises' participation during the study period in construction resulted in disparity indices of zero from FY 95 through FY 99, indicating that these firms were not utilized in this procurement category even though they were available to do construction work during these years

The disparity indices for African American firms ranged from a low of 0.00 to 19.44. This minority group's participation in construction resulted in over-utilization in 1996 and 1999. Their utilization at the prime level resulted in an aggregate DI of 1.15 indicating an over-utilization.

For African Americans there was a wide range of utilization from year to year that did not follow a progressive or linear pattern. In 1995, 1997 and 1998, African Americans were under-utilized at a statistically significant level. The disparity index in 1997 was 0. So, despite high rates of utilization relative to availability in 1996 and 1999, for three of the five years African Americans were under-utilized. This "feast or famine" is driven by the lack of utilization as subcontractors and also causes low availability. There are no regular opportunities to be obtained.

Hispanic firms followed the pattern of African American firms with a high of 8.97 and a low of 6.92 over the study period. Again these peaks occurred in 1996 and 1999. In all other years, Hispanics were at a statistically significant rate of zero. Overall, for the study, Hispanics were over-utilized with an index of 2.55. However, again the wide variance raises questions about the openness of opportunities that more consistent patterns would not raise.

Women Business Enterprises experienced an overall under-utilization relative to their availability during the study period with a disparity index of 0.09. A typical disparity index for women-owned firms during the study period was 0.16, indicating a significant under-utilization in this procurement category.



**Table 16**  
**THE COMMONWEALTH OF KENTUCKY**  
**M/WFBE DISPARITY INDEX**  
**CAPITAL CONSTRUCTION**

FISCAL YEAR	M/WFBE	ASIAN	AFRICAN AMERICAN	HISPANIC	NATIVE AMERICAN	WHITE FEMALE
1995	0.12	0.00	0.53	0.00	-	0.09
1996	2.49	0.00	11.04	6.82	-	0.01
1997	0.37	0.00	0.00	0.00	-	0.00
1998	0.09	0.00	0.86	0.00	-	0.00
1999	3.77	0.00	19.44	8.97	-	0.48
TOTAL	1.15	0.00	5.32	2.55	-	0.09

Source: Griffin & Strong, P.C.

## 2. Analysis of Disparity Indices using availability estimates based on Census data

The disparity indices for capital construction are displayed in Table 17. The availability estimates used for their calculation are based on census data.

The disparity indices for Minority and White Female Business Enterprises in construction range from 0.01 to 0.55 during the study period. M/WFBEs' overall disparity index for the study period is 0.17, indicating an under-utilization. It is worth noting that an over-utilization was inferred for M/WFBEs using bid data for the availability estimation.

Similar to the disparity index yielded by the availability estimates based on bid data, census data used for availability estimation show that Asian Business Enterprises' participation during the study period in construction resulted in disparity indices of zero, indicating that these firms were not utilized in this procurement category even though they were available to do construction work during these years.

The disparity indices for African American firms ranged from a low of 0.00 to 3.92. Census data also show that this minority group's participation in construction resulted in

over-utilization in 1996 and 1999. Their utilization at the prime level resulted in an aggregate DI of 0.92, indicating under-utilization.

Hispanic firms followed the pattern of African American firms with a high of 5.43 and a low of 0.00 over the study period. Again these peaks occurred in 1996 and 1999 and in all other years Hispanics were at a statistically significant rate of zero. Overall, for the study, Hispanics were over-utilized with an index of 1.55. However, again the wide variance raises questions about the openness of opportunities that more consistent patterns would not.

Native American firms' participation in construction during the study period resulted in a disparity index of zero, indicating that minority firms belonging to this minority group were not utilized during the Study Period.

Women Business Enterprises experienced an overall underutilization relative to their availability during the study period with a disparity index of 0.01 indicating a significant under-utilization.

**Table 17**  
**THE COMMONWEALTH OF KENTUCKY**  
**M/WFBE DISPARITY INDEX USING AVAILABILITY BASED ON CENSUS DATA**  
**CAPITAL CONSTRUCTION**

FISCAL YEAR	M/WFBE	ASIAN	AFRICAN AMERICAN	HISPANIC	NATIVE AMERICAN	WHITE FEMALE
1995	0.02	0.00	0.09	0.00	0.00	0.01
1996	0.37	0.00	1.90	4.13	0.00	0.00
1997	0.05	0.00	0.00	0.00	0.00	0.00

1998	0.01	0.00	0.15	0.00	0.00	0.00
1999	0.55	0.00	3.35	5.43	0.00	0.06
<b>TOTAL</b>	<b>0.17</b>	<b>0.00</b>	<b>0.92</b>	<b>1.55</b>	<b>0.00</b>	<b>0.01</b>

Source: Griffin &amp; Strong, P.C.

## **b. Transportation Construction**

### **1. Analysis Of Disparity Indices Using Availability Based On Bid Data**

Construction disparity indices for M/WFBEs are displayed in Table 18. They ranged from 0.87 to 6.02. M/WFBEs aggregate disparity index is 3.26, indicating over-utilization relative to their availability in construction during the study period. However, this average figure is skewed by the over-utilization of Asian firms with all other M/WBEs being under-utilized.

Asian firms' aggregate disparity index is 22.71 suggesting a significant over-utilization relative to their availability.

African Americans show under-utilization for all the years of the study period, with disparity indices clustered around 0.11. Their participation resulted in an overall disparity index of 0.11, indicating an under-utilization during the study period.

Hispanic firms show under-utilization in all five years of the study with a high of .51 in 1998 and a figure of zero for all other years. These consistent figures represent a clear pattern of under-utilization that mirrors the situation of African American firms.

Native American firms' participation for all the years shows an absence of utilization and availability. Thus, the disparity indices for these three minority groups are designated by the dash symbol (undefined, or utilization of zero divided by availability of zero).

Construction disparity indices for White Female Business Enterprises ranged from 0.79 to 6.94. Their participation during the study period resulted in a disparity index of 3.41, indicating over-utilization by Transportation.

Table 18

**THE COMMONWEALTH OF KENTUCKY  
M/WFBE DISPARITY INDEX IN CONSTRUCTION USING AVAILABILITY BASED ON BID  
DATA**

**TRANSPORTATION CONSTRUCTION**

FISCAL YEAR	M/WFBE	ASIAN	AFRICAN AMERICAN	HISPANIC	NATIVE AMERICAN	WHITE FEMALE
1995	4.68	43.16	0.22	0.00	-	4.32
1996	0.87	8.43	0.00	0.00	-	0.79
1997	6.02	31.98	0.11	0.00	-	6.94
1998	4.06	31.57	0.00	0.51	-	4.00
1999	1.25	2.26	0.22	0.00-	-	1.66
<b>TOTAL</b>	<b>3.26</b>	<b>22.71</b>	<b>0.11</b>	<b>0.11</b>	<b>-</b>	<b>3.41</b>

Source: Griffin & Strong, P.C.

**2. Analysis Of Disparity Indices Using Availability Based On Census Data**

The construction disparity indices for M/WFBEs displayed in Table 19 are based on availability estimates derived from the 1997 census data. They ranged from 0.12 to 0.64. M/WFBEs aggregate disparity index is 0.44, indicating under-utilization relative to their availability in construction during the study period. However, this average figure is skewed by the over-utilization of Asian firms, with all other M/WFBEs being under-utilized.

The overall disparity index for Asian firms is 18.92 suggesting a significant over-utilization relative to their availability.

African Americans show under-utilization for all the years of the study and their participation resulted in an overall disparity index of 0.02 indicating a significant under-utilization during the study period.

Hispanic firms show under-utilization in all five years of the study with a high of 0.31 in 1998 and zero for all other years. These consistent figures represent a clear pattern of under-utilization that mirrors the situation of African American firms.

Native American Businesses' participation for all the years shows an absence of utilization. These firms aggregate disparity index is zero, indicating the presence of Native American firms in the market place according to census data.

Construction disparity indices for White Female Business Enterprises ranged from 0.09 to 0.80. Their participation during the study period resulted in a disparity index of 0.39, indicating a significant under-utilization by Transportation.

**Table 19**

**THE COMMONWEALTH OF KENTUCKY  
M/WFBE DISPARITY INDEX IN CONSTRUCTION USING AVAILABILITY BASED ON CENSUS  
DATA**

**TRANSPORTATION CONSTRUCTION**

FISCAL YEAR	M/WFBE	ASIAN	AFRICAN AMERICAN	HISPANIC	NATIVE AMERICAN	WHITE FEMALE
1995	0.64	35.96	0.04	0.00	0.00	0.50
1996	0.12	7.02	0.00	0.00	0.00	0.09
1997	0.82	26.65	0.02	0.00	0.00	0.80
1998	0.55	26.31	0.00	0.31	0.00	0.46
1999	0.17	1.89	0.04	0.00	0.00	0.19

TOTAL	0.44	18.92	0.02	0.07	0.00	0.39
-------	------	-------	------	------	------	------

Source: Griffin &amp; Strong, P.C.

➤ **Minorities and White Female Business Enterprises (M/WFBE) Disparities in Professional Services using census data**

The professional services disparity indices for M/WFBEs displayed in Table 20 are based on availability estimates derived from the 1997 census data. For this particular procurement category, this consultant could not secure bid data for availability estimation. M/WFBEs' aggregate disparity index is 0.24, indicating under-utilization relative to their availability in professional services during the study period.

The overall disparity index for Asian firms is 0.97, suggesting an under-utilization relative to their availability.

African Americans show disparity indices of zeros for all the years of the Study Period indicating that they were not utilized even though they were available in the market place.

Hispanic and Native American Businesses' participation for all the years shows an absence of utilization. These firms' aggregate disparity index is zero indicating the presence of Hispanic and Native American firms in the market place according to census data.

Professional services disparity indices for White Female Business Enterprises ranged from 0.09 to 0.58. Their participation during the study period resulted in a disparity index of 0.22, indicating a significant under-utilization by Transportation.

**Table 20**

**THE COMMONWEALTH OF KENTUCKY  
M/WFBE DISPARITY INDEX IN PROFESSIONAL SERVICES USING AVAILABILITY BASED ON  
CENSUS DATA**

**TRANSPORTATION**

FISCAL YEAR	M/WFBE	ASIAN	AFRICAN AMERICAN	HISPANIC	NATIVE AMERICAN	WHITE FEMALE
1995	0.25	0.00	0.00	0.00	0.00	0.28
1996	0.51	0.00	0.00	0.00	0.00	0.58
1997	0.39	1.22	0.00	0.00	0.00	0.36
1998	0.13	0.91	0.00	0.00	0.00	0.09
1999	0.15	1.16	0.00	0.00	0.00	0.10
TOTAL	0.24	0.97	0.00	0.00	0.00	0.22

Source: Griffin &amp; Strong, P.C.

➤ **Minorities and White Female Business Enterprises (M/WFBE) Disparities in Commodities and Non Professional Services**

**a. Purchases made through Finance and Administration**

**1. Analysis Of Disparity Indices Using Availability Based On Bid Data**

Commodities and Non Professional Services disparity indices for M/WFBEs ranged from a low of 0.16 to a high 1.84 (reference Table 21). While M/WFBEs were over utilized in FY 95, they were under-utilized for the other years of the study period. The resulting aggregate disparity index is 0.68 indicating under-utilization during the study period.

Disparity indices for White Female Business Enterprises ranged from 0.09 to 1.71. Their participation during the study period resulted in a disparity index of 0.49, indicating significant under-utilization.

Disparity indices for the unidentified minorities ranged from 0.18 to 2.33, with an overall DI of 1.36, indicating over utilization.<sup>61</sup>

**Table 21**

<sup>61</sup> This DI must be interpreted with caution because, were it possible to properly identify these firms, the corresponding minority groups may well be significantly under-utilized.

**THE COMMONWEALTH OF KENTUCKY  
M/WFBE DISPARITY INDEX IN COMMODITIES AND NON-PROFESSIONAL SERVICES  
PURCHASES MADE THROUGH FINANCE AND ADMINISTRATION**

FISCAL YEAR	M/WFBE	ASIAN	AFRICAN AMERICAN	HISPANIC	NATIVE AMERICAN	WHITE FEMALE	UNID. MBEs
1995	1.84	-	0.00	-	-	2.33	2.33
1996	0.67	-	0.00	-	-	0.17	2.51
1997	0.64	-	0.00	-	-	0.76	0.18
1998	0.16	-	0.00	-	-	0.11	0.32
1999	0.16	-	0.00	-	-	0.09	0.40
<b>TOTAL</b>	<b>0.68</b>	<b>-</b>	<b>0.00</b>	<b>-</b>	<b>-</b>	<b>0.49</b>	<b>1.36</b>

Source: Griffin &amp; Strong, P.C.

**2. Analysis Of Disparity Indices Using Availability Estimates Based On Census Data.**

Commodities and Non Professional Services disparity indices for M/WFBEs are displayed in Table 22. They ranged from a low of 0.16 to a high 1.84. Similar to inferences made based on bid data, census data show that M/WFBEs were over-utilized in FY 95, and under-utilized for the other years of the study period. The overall disparity index is 0.52, indicating under-utilization.

White Female firms were the only businesses utilized during the Study Period. Their disparity indices for White Female Business Enterprises ranged from 0.06 to 1.10. Their participation during the study period resulted in a disparity index of 0.32, indicating significant under-utilization.

Table 22

**THE COMMONWEALTH OF KENTUCKY  
M/WFBE DISPARITY INDEX IN COMMODITIES AND NON-PROFESSIONAL SERVICES  
PURCHASES MADE THROUGH FINANCE AND ADMINISTRATION**

FISCAL YEAR	M/WFBE	ASIAN	AFRICAN AMERICAN	HISPANIC	NATIVE AMERICAN	WHITE FEMALE
-------------	--------	-------	------------------	----------	-----------------	--------------



1995	1.41	0.00	0.00	0.00	0.00	1.10
1996	0.52	0.00	0.00	0.00	0.00	0.11
1997	0.49	0.00	0.00	0.00	0.00	0.49
1998	0.12	0.00	0.00	0.00	0.00	0.07
1999	0.12	0.00	0.00	0.00	0.00	0.06
<b>TOTAL</b>	<b>0.52</b>	<b>0.00</b>	<b>0.00</b>	<b>0.00</b>	<b>0.00</b>	<b>0.32</b>

Source: Griffin &amp; Strong, P.C.

## **b. Purchases Made Through Transportation**

### **1. Analysis of disparity indices using availability based on bid data**

Disparity indices for purchases of commodities and non-professional services made through Transportation are displayed in Table 23.

Minorities and White Female Business Enterprises' aggregate disparity index is 0.74, indicating an under utilization.

Asian, Hispanic and Native American firms' participation for all the years of the study period shows an absence of utilization and availability. Thus, the disparity indices for these two minority groups are designated by the dash symbol (undefined, or utilization of zero divided by availability of zero).

Disparity indices for African American firms are all zeros for all the years of the study period indicating an absence of utilization of this group in this procurement category by the Commonwealth of Kentucky, even though they were available.

**Table 23**  
**THE COMMONWEALTH OF KENTUCKY**  
**M/WFBE DISPARITY INDEX IN**  
**COMMODITIES AND NON-PROFESSIONAL SERVICES**  
**PURCHASES MADE THROUGH TRANSPORTATION**

FISCAL YEAR	M/WFBE	ASIAN	AFRICAN AMERICAN	HISPANIC	NATIVE	WHITE FEMALE
----------------	--------	-------	---------------------	----------	--------	-----------------

1995	1.21	-	0.00	-	-	1.68
1996	0.79	-	0.00	-	-	1.10
1997	0.00	-	0.00	-	-	0.00
1998	0.16	-	0.00	-	-	0.21
1999	0.07	-	0.00	-	-	0.09
<b>TOTAL</b>	<b>0.74</b>	<b>-</b>	<b>0.00</b>	<b>-</b>	<b>-</b>	<b>1.03</b>

Source: Griffin &amp; Strong, P.C.

## 2. Analysis of disparity indices using availability based on census data

Minorities and White Female Business Enterprises' aggregate disparity index is 0.12, indicating an under utilization.

Disparity indices for Asian American, African American, Hispanic and Native American firms are all zeros for all the years of the study period indicating an absence of utilization of these groups in this procurement category by the Commonwealth of Kentucky, even though they were available.

Even though White Female firms were the only group to receive payments for this procurement category, they were under utilized for all the years of the Study Period with an overall disparity index of 0.12.

**Table 24**  
**THE COMMONWEALTH OF KENTUCKY**  
**M/WFBE DISPARITY INDEX IN**  
**COMMODITIES AND NON-PROFESSIONAL SERVICES**  
**(CENSUS DATA USED FOR AVAILABILITY ESTIMATION)**  
**PURCHASES MADE THROUGH TRANSPORTATION**

FISCAL YEAR	M/WFBE	ASIAN	AFRICAN AMERICAN	HISPANIC	NATIVE	WHITE FEMALE
1995	0.19	0.00	0.00	0.00	0.00	0.20
1996	0.12	0.00	0.00	0.00	0.00	0.13
1997	0.00	0.00	0.00	0.00	0.00	0.00
1998	0.02	0.00	0.00	0.00	0.00	0.03
	0.01	0.00	0.00	0.00	0.00	0.01

1999						
TOTAL	0.12	0.00	0.00	0.00	0.00	0.12

Source: Griffin & Strong, P.C.

### 3. Minorities and White Female Business Enterprises (M/WFBE) Disparities in Architecture and Engineering (A/E)

#### 1. Analysis of Disparity indices using availability based on bid data

The disparity indices for Asian, Hispanic, White Female, and Native American firms are designated by the dash symbol (undefined, or utilization of zero divided by availability of zero), indicating an absence of utilization and availability for these minority groups for all the years in this procurement category.

The participation of African American firms resulted in disparity indices designated by "infinity" for FY 96 and FY 97.

Table 25

**THE COMMONWEALTH OF KENTUCKY  
M/WFBE DISPARITY INDEX IN  
ARCHITECTURE AND ENGINEERING (A/E)**

FISCAL YEAR	M/WFBE	ASIAN	AFRICAN AMERICAN	HISPANIC	NATIVE AMERICAN	WHITE FEMALE
1995	-	-	-	-	-	-
1996	∞	-	∞	-	-	-
1997	∞	-	∞	-	-	-
1998	-	-	-	-	-	-
1999	-	-	-	-	-	-
TOTAL	∞	-	∞	-	-	-

Source: Griffin & Strong, P.C.

#### 2. Analysis of Disparity indices using availability based on bid data

The disparity indices for Asian, Hispanic, Native American and White Female firms are all zeros for all the years of the Study Period indicating an absence of utilization of these groups by the Commonwealth even though they were available in the market place.

The participation of African American firms resulted in disparity indices of zero for FY 95, FY 98 and FY 99 indicating that they were not utilized during these years of the Study Period even though they were available. These firms experienced very small utilization compared to their availability for FY 96 and FY 97 resulting in an overall disparity index of 0.17, thus indicating a significant under utilization.

Table 26

**THE COMMONWEALTH OF KENTUCKY  
M/WFBE DISPARITY INDEX IN  
ARCHITECTURE AND ENGINEERING (A/E)  
(CENSUS DATA FOR AVAILABILITY ESTIMATION)**

FISCAL YEAR	M/WFBE	ASIAN	AFRICAN AMERICAN	HISPANIC	NATIVE AMERICAN	WHITE FEMALE
1995	0.00	0.00	0.00	0.00	0.00	0.00
1996	0.02	0.00	0.41	0.00	0.00	0.00
1997	0.02	0.00	0.40	0.00	0.00	0.00
1998	0.00	0.00	0.00	0.00	0.00	0.00
1999	0.00	0.00	0.00	0.00	0.00	0.00
<b>TOTAL</b>	<b>0.01</b>	<b>0.00</b>	<b>0.17</b>	<b>0.00</b>	<b>0.00</b>	<b>0.00</b>

Source: Griffin &amp; Strong, P.C.

## F. Summary of Quantitative Analysis

For this study, the project team collected data regarding contracting and bidding to:

- (a) determine relevant market area;
- (b) determine availability of minority, woman-owned, and majority-owned firms in various procurement categories;
- (c) determine the utilization of firms by procurement category and M/WFBE status; and
- (d) determine whether disparities existed between the availability of M/WFBE firms and their utilization.

The qualitative analysis of purchasing activity for the Commonwealth of Kentucky shows an underutilization of minority- and women-owned businesses in several major

procurement categories for the fiscal years examined. However, some categories demonstrate over-utilization or no disparity. It is also important to note that the availability findings show a particularly low availability of minority-owned firms in several procurement categories.

### III. HISTORICAL ANALYSIS

#### A. Introduction

As with most places in the United States, race relations have evolved significantly in the Commonwealth of Kentucky since the inception of the Commonwealth. In 1995, the Kentucky Commission on Human Rights reported that the salary gap between white and black state employees narrowed.<sup>62</sup> Frank X Walker, an African American Kentucky native, activist and artist, was selected as the 1999 Model Citizen of the Year by *Ace Magazine*.<sup>63</sup> The *Louisville Defender* recently lauded Governor Paul E. Patton's appointment of Ishmon Burks as Commissioner of the Kentucky State Police. Burks is the first African-American to hold that position.<sup>64</sup>

Kentucky has the reputation for being among the most racially tolerant states in the South. Such a presumed atmosphere suggests, among other things, that the arc of Black business development and contracting with the state government is on par with that of White-owned businesses. Yet, a deeper look at current and historical events challenges any assumptions of racial equality.

The state's Commission on Human Rights cautioned that any celebration of a racially-just hiring policy is premature. First, the aforementioned Black gains in income were concentrated in only three of thirteen state cabinets. Second, pockets of extreme under-representation of Blacks in state government persisted in most job categories. Third, in eight of the thirteen state cabinets, the rate at which Blacks were fired surpassed their proportion in that department. For instance, Blacks comprised just 4.6% of

---

<sup>62</sup> . Kentucky Commission on Human Rights, Staff Report 95-4, "Status of Blacks in Kentucky Government Agencies," (1995), pp. 4-5.

<sup>63</sup> . Phyllis Sargent, "Renaissance Man: Activist - Artist - Icon, Frank X Walker Is This Year's Model," *Ace Magazine*, December 22, 1999, on-line version, [<http://www.aceweekly.com>], p. 1 of 11.

<sup>64</sup> . "First African American State Police Commissioner Named By Governor," *Louisville Defender*, November 9, 2000, p. C17

personnel in the state's Finance Cabinet, yet were 32.3% of employees terminated between November 1993 and November 1994.<sup>65</sup>

## B. Employment Trends

In terms of wider employment trends, potential African American workers are leaving the state in a quest for opportunities in more diverse, hospitable environments.<sup>66</sup> Early last year, State Senator Gerald Neal introduced legislation to end racial profiling, only to have the measure defeated.<sup>67</sup> More recently, State Auditor Ed Hatchett castigated the Finance and Administration Cabinet for its failure to enforce Equal Employment Opportunity contract laws and statutorily-mandated set-asides for small and minority-owned businesses.<sup>68</sup> These setbacks are significant because they highlight trends of continued disparate treatment of Whites and Blacks in government institutions. Sadly, these negative phenomena have deep roots in Bluegrass soil.

Racism has retarded Black business development and access to public contracts in the state. In the Quantitative Analysis portion of this report, the project team has determined the availability of minority and women businesses in the Commonwealth of Kentucky. In this historical analysis, we found that the low availability of Black firms for state contracting work results from historical factors relating directly to violence, intimidation, and discrimination, particularly with regard to the creation of wealth in the state's Black communities.

Two award-winning sociologists have "argued that a plethora of state policies from slavery through the mid-twentieth century crippled the ability of [B]lacks to gain a foothold in American society. Owing to their severely restricted ability to accumulate

---

<sup>65</sup> "Status of Blacks in Kentucky Government Agencies," pp. 37-51.

<sup>66</sup> Jamie Butters, "Work Force Sees Shift: Many Blacks Leaving State; More Women are Working," *Lexington Herald-Leader*, December 3, 1999, on-line version [<http://www.kentuckyconnect.com/heraldleader>], pp. 1-3 of 4.

<sup>67</sup> Joseph Gerth, "Neal Renews Fight to Ban Racial Profiling," *Louisville Courier-Journal*, March 16, 2000; Rick McDonough, "Bill Designed to Detect Racial Profiling," *Louisville Courier-Journal*, February 9, 2000 (both articles are on-line versions [<http://www.courierjournal.com>]).



wealth combined with massive discrimination in the private sector and general white hostility, [B]lack parents over several generations were unable to pass any appreciable assets to their kin.”<sup>69</sup> This inability to accumulate and maintain wealth has had a negative impact on Black self-employment.<sup>70</sup> Moreover, this impediment undermines the ability of Blacks to influence the political institutions which greatly affect their lives.<sup>71</sup> Ironically, Black economic development itself often has triggered White resentment and hostility, resulting in racial violence that further crippled Black economic growth.<sup>72</sup>

Accordingly, this analysis shows that the historical “cost of being Black” continues to impede Black business development and, in turn, the ability of Blacks to procure contracts with the Commonwealth of Kentucky.

### C. Blacks in Antebellum Kentucky

Kentucky was founded in 1792 as immigrants from Great Britain and Germany and other European countries abandoned mid-Atlantic states like Pennsylvania, Virginia and North Carolina in search of a place to carve their own niche.<sup>73</sup> At their inception, the enslavement of Africans was of vital economic importance to the original thirteen

<sup>68</sup> . “Hatchett Criticizes State’s Efforts on Behalf of Minorities,” *Louisville Defender*, p. C18.

<sup>69</sup> . Melvin L. Oliver and Thomas M. Shapiro, *Blacks Wealth/White Wealth: A New Perspective on Racial Inequality* (New York and London: Routledge, 1997), pp. 151-152.

<sup>70</sup> . See, e.g., Gregory Squires, *Capital and Communities in Black and White* (Albany, NY: State University of New York Press, 1994).

<sup>71</sup> . See, e.g., Douglas S. Massey and Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* (Cambridge, MA. and London: Harvard University Press, 1993), pp. 155-160; see generally, Denny Braun, *The Rich Get Richer: The Rise of Income Inequality in the United States and the World* (Chicago: Nelson-Hall, 1991); William J. Wilson, *The Truly Disadvantaged* (Chicago: University of Chicago Press, 1987); Norman Yetman, ed., *Majority and Minority: The Dynamics of Race and Ethnicity in American Life*, 5<sup>th</sup> ed. (Boston: Allyn and Bacon, 1991); but cf., Thomas Dye, *Who’s Running America?* (Englewood Cliffs, NJ.: Prentice-Hall, 1979).

<sup>72</sup> . Leon Prather, *We Have Taken A City* (Rutherford, NJ.: Fairleigh Dickinson University Press, 1984) (with regard to the 1898 race riots in Wilmington, NC., sparked in part by White envy of Black business development in downtown Wilmington); Michael D’Orso, *Like Judgment Day: The Ruin and Redemption of a Town Called Rosewood*, (New York: Boulevard Books, 1996); Scott Ellsworth, *Death in a Promised Land: The Tulsa Race Riot of 1921* (Baton Rouge, LA: Louisiana State University Press, 1982) (which documents a race riot which began in downtown Tulsa, quickly spread to the Black community [Greenwood], and destroyed the Black business collective which was known across the nation as “Black Wall Street.”).

<sup>73</sup> . Marion B. Lucas, *A History of Blacks in Kentucky, vol. 1: From Slavery to Segregation, 1760-1891* (Frankfort, KY: Kentucky Historical Society, 1992), pp. xiv-xv.

colonies.<sup>74</sup> As might be expected, the import of African slaves, as well as the work of “free” Blacks, played a decisive role in the formation of the Commonwealth.

At the outset, slavery was concentrated in the Bluegrass, Western, and Jackson Purchase districts of Kentucky.<sup>75</sup> Although large-scale slavery was confined to a handful of White elites, the extreme wealth generated by the “Peculiar Institution” spread throughout the state, carrying an economic impact for non-slave-owning Whites as well.<sup>76</sup> However, for Blacks slavery meant severe constraints on opportunities and life chances, to say the least.

By its very nature, African slavery in America was a direct impediment to the Africans’ enjoyment of rights and privileges which Whites took for granted. Slaves had no voice in civic affairs, could not practice the religion of their choice, and had little authority over their families or the lives of friends and loved ones.<sup>77</sup> Adding insult to injury was the fact that colonial legislators determined that slave converts to Christianity did not become free persons. The drafters of the U.S. Constitution determined that slaves should be counted as less than a whole person for purposes of representation in Congress (Article 1, section 2, otherwise known as the “three-fifths clause”).<sup>78</sup> African slavery allowed the European settlers to create a national identity that was exclusively White and to privilege the property interests of Whites above the “natural rights” of other human beings.<sup>79</sup>

<sup>74</sup> See, e.g., Ira Berlin and Ronald Hoffman, eds., Slavery and Freedom in the Age of the American Revolution (Charlottesville, VA.: University of Virginia Press, 1983); Eric Williams, Capitalism and Slavery (Chapel Hill, NC.: University of North Carolina Press, 1944).

<sup>75</sup> Lucas, A History of Blacks in Kentucky: vol 1, pp. xix-xxii; see also W. E. B. DuBois, Black Reconstruction in America, 1860-1880 (New York: Atheneum edition, 1992), pp.566-567.

<sup>76</sup> Lucas, A History of Blacks in Kentucky, vol. 1, pp. 84-88, 103-108.

<sup>77</sup> John H. Franklin and Alfred A. Moss, From Slavery to Freedom: A History of African Americans (New York: McGraw-Hill, seventh edition, 1998), pp. 113-120, 124-140; Jacqueline Jones, Labor of Love, Labor of Sorrow: Black Women, Work and the Family, From Slavery to the Present (New York: Vintage Books, 1985), pp. 21-22.

<sup>78</sup> Franklin and Moss, From Slavery to Freedom, pp. 58-60, 82; James Oakes, Slavery and Freedom: An Interpretation of the Old South, (New York: Vintage Books, 1990), pp. 28-29; Forrest Woods, The Arrogance of Faith, (New York: Alfred A. Knopf, Inc., 1990), p. 289.

<sup>79</sup> Robert M. Cover, Justice Accused: Antislavery and the Judicial Process (New Haven and London: Yale University Press, 1975), pp. 22-28, 51-55; A. Leon Higginbotham, Jr. and Barbara K. Kopytoff, “Property First, Humanity

In addition to the brutality of the beatings, verbal and sexual abuses, and malnourishment of slaves, at its base the slave system was a deprivation of the wealth of Black workers. Perhaps this disability was felt most acutely by the few slaves who were leased by their owners to perform wage-earning work for another employer.

Although [W]hites were often unsure why hired slaves ran away, [B]lacks were more certain: Why were they not permitted to keep a portion of their wages? If they were permitted to keep a part of their earnings, why were they not allowed to keep enough to provide more for their families? In short, there seemed to be no relationship between work, wages, and rewards.<sup>80</sup>

Consequently, it is from this point that the story of Black economic development in Kentucky must begin.

Isaac Griffin, a Trimble County slave, told an interviewer in 1856 that “[s]lavery is the greatest curse on the earth.”<sup>81</sup> As in other slave states, Kentucky slave owners held absolute power over their captives, controlling or limiting their diets, subverting the relationships within slave families, and forcing African women to become a human assembly line to produce new slaves in the form of children. They extracted debilitating, profit-generating work from Africans by all manner of punishment and perversion. Although household slaves avoided the outdoor work that was done in rain, cold, or blazing sun, they were subject to abuse as well because of their close proximity to the slaveholder and his or her family and friends.<sup>82</sup>

---

Second: The Recognition of the Slave's Human Nature in Virginia Civil Law," 50 *Ohio State Law Journal* 511 (Summer 1989), p. 512-516; see also Peter S. Onuf, "A Declaration of Independence for Diplomatic Historians," *Diplomatic History*, vol. 22, no. 1, pp. 71-83 (Winter 1998).

<sup>80</sup> John H. Franklin and Loren Schwenger, *Runaway Slaves: Rebels on the Plantation* (New York and Oxford: Oxford University Press, 1999), p. 35.

<sup>81</sup> Lucas, *A History of Blacks in Kentucky*, vol. 1, p. 51.

<sup>82</sup> Ibid., pp. 2-7, 21-27, 64, 94.

Even though most Whites were not slaveholders and most slave owners actually owned fewer than twenty slaves, the growing influence of slavery on the state's economy went unchallenged. Slaves with artisan's skills were highly valued by Whites. In fact, slaves worked in a number of manufacturing concerns, ranging from mines to iron mills, throughout the 19<sup>th</sup> century. Some slaves even served as tour guides in Louisville. Given the nature of the "peculiar institution," this diversity of work experience primarily benefited slave owners or other Whites who employed slaves.<sup>83</sup>

Slaves in Kentucky resisted slavery in a number of ways: assaulting their owners, running away, engaging in work "slowdowns," self-mutilation, or suicide. A few Whites assisted slaves in some manner to escape their torment but the initiative always rested with the African.<sup>84</sup> Henry Bibb stands as perhaps the most well known representative of the frustrations of a Kentucky slave. At one time resigned to his fate, Bibb only entertained ideas of an escape to freedom after the abuse of his wife and daughter by their owner. Bibb escaped to Canada in 1837 and, against the advice of friends, returned to Kentucky the following Spring to liberate his spouse and child. Because he was betrayed when he arrived in Kentucky, he was arrested in Louisville. Although he escaped from jail, he was never able to free his family because they remained under the increasingly vigilant eyes of slave owners and other slaves.<sup>85</sup>

Because it rested between the industrialized North and the agrarian Deep South, Kentucky endured both economic and political schizophrenia.<sup>86</sup> As a result, there existed a mixed sentiment in the state with regard to human bondage. Henry Clay, a prominent U.S. Senator, helped establish the American Colonization Society, a group whose aim was to return "free" Blacks to the African continent. Although he believed that slavery was wrong, the elder Clay asserted that slaveholders should receive remuneration for their

---

<sup>83</sup> . Ibid., pp. 8-10, 28.

<sup>84</sup> . Ibid., pp. 57-81.

<sup>85</sup> . See Henry Bibb, Narrative of the Life and Adventures of Henry Bibb, an American Slave (New York: H. Bibb, 1849); Lucas, A History of Blacks in Kentucky, vol. 1, pp. 51, 81.

<sup>86</sup> . DuBois, Black Reconstruction, p. 567.

freed captives, who would then be shipped out of the United States.<sup>87</sup> Most Black abolitionists were highly suspicious of the ACS because they believed it to be a veiled attempt to secure the institution of slavery by ridding the United States of non-slave Blacks whose very presence endangered the system of bondage.<sup>88</sup> On the other hand, abolitionists like the famous Cassius Clay deplored the institution and actively sought its termination. However, most of these activists were convinced of one thing: that Blacks were inherently inferior to Whites.<sup>89</sup> In spite of the spirited agitation of prominent abolitionists, the 1850 convention of Kentucky legislators strengthened the legal supports for slavery.<sup>90</sup> Accordingly, the antagonistic racial atmosphere in antebellum Kentucky made life difficult for Blacks who lived outside of bondage.

Despite their efforts at settling and defending the fledgling state, non-slave Blacks found life among Whites to be almost unbearable as early as 1751.<sup>91</sup> Although Africans constituted roughly one-quarter of the state's population by 1830, enslaved Blacks outnumbered their non-slave brethren by a margin of 22:1.<sup>92</sup> The emergence of Black codes to control the behavior of non-slave Blacks acted as a major burden on Black freedom.<sup>93</sup> Aside from laws, White harassment and kidnapping by slave traders further limited Black freedom and mobility. Consequently, life for non-slave Blacks was quite precarious, especially since Blacks were restricted to low-paying, non-professional jobs

<sup>87</sup> Carl Degler, The Other South: Southern Dissenters in the Nineteenth Century, (Boston: Northeastern University Press, 1982), pp. 79-84.

<sup>88</sup> Martin Delany, Martin Delany, The Condition, Elevation, Emigration and Destiny of the Colored People in the United States (Salem, NH: Ayer Co. Publishers, Inc. reprint edition, 1988), pp. 30-36; Lucas, A History of Blacks in Kentucky, vol. 1, pp. 53-54; Sterling Stuckey, "A Last Stern Struggle: Henry Highland Garnet and Liberation Theory," in Leon Litwack and August Meier, eds., Black Leaders of the Nineteenth Century, (Urbana, Ill.: University of Illinois Press, 1988), p. 145.

<sup>89</sup> Degler, The Other South, pp. 55-60.

<sup>90</sup> Ibid., pp. 85-93; George C. Wright, "The Forced Removal of Afro-Americans from Rural Kentucky," *Reflections: Occasional Papers on Research in Kentucky Public Records*, vol. 1, no. 1 (1990), p. 1.

<sup>91</sup> See generally Marion B. Lucas, "African Americans on the Kentucky Frontier," *Register of the Kentucky Historical Society*, vol. 95, no. 2 (1997), pp. 121-134.

<sup>92</sup> Lucas, A History of Black Kentucky, vol. 1, pp. xv-xvi, 108.

<sup>93</sup> Richard C. Brown, "Free Blacks of Boyle County, Kentucky, 1850-1860: A Research Note," *Register of Kentucky History*, vol. 87, no. 4 (1989), pp. 426-438; see also Juliet E. K. Walker, Juliet, "The Legal Status of Free Blacks in Early Kentucky, 1792-1825," *Filson Club History Quarterly*, vol. 57, no. 4 (1983), pp. 382-395.

and the majority lived on the edge of poverty in the towns of the Bluegrass district.<sup>94</sup> Although non-slave Blacks devised alternative survival strategies to cope with numerous hardships, their valiant efforts failed to lift them out of their status as social pariahs.<sup>95</sup> The fate of the institution of slavery was equally uncertain as the 1860s approached.

As mentioned above, Whites in Kentucky were divided with respect to the institution of slavery. Although the state remained loyal to Lincoln's federal government, tens of thousands of Whites in Kentucky sympathized with the Confederacy.<sup>96</sup> Notwithstanding the local abolitionist movement, most Kentucky slave owners were confident that, at worst, they would be compensated if forced to surrender their slaves. Of course, the state's slave owners nervously awaited the outcome of the Civil War. Although the Emancipation Proclamation did not apply to slaves in Delaware, Kentucky, Maryland, and Missouri (the so-called Border States),<sup>97</sup> Kentucky slavers worried that Lincoln's pronouncement effectively changed the nature of the conflict from a war of secession to a war to end slavery.<sup>98</sup> What they failed to realize was the willingness of Africans to free themselves.

In fact, military service during the Civil War seems to have been the most consistent means for the manumission of slaves.<sup>99</sup> "The enlistment of slaves ended the slave system. The cash bounty and offer of freedom brought droves of [B]lack volunteers...Ten thousand slaves left the state during the year 1863; slaves enlisted at the rate of a hundred a day, and after the war, were freed at the rate of 500 a day."<sup>100</sup> White Union soldiers extended their ambivalence or outright hostility toward Blacks to men

---

<sup>94</sup> Lucas, *A History of Blacks in Kentucky*, vol. 1, pp. 108-117.

<sup>95</sup> Alexander I. Burkin, "A Spirit of Perseverance: Free African Americans in Late Antebellum Louisville," *Filson Club History Quarterly*, vol. 70, no. 1 (1996), pp. 61-81; see also Robert P. Stuckert, "Free Black Populations of the Southern Appalachian Mountains: 1860," *Journal of Black Studies*, vol. 23, no. 3 (1993), pp. 358-370.

<sup>96</sup> Lucas, *A History of Blacks in Kentucky*, vol. 1, pp. 146-150, 156-157.

<sup>97</sup> Franklin & Moss, *From Slavery to Freedom*, pp. 207.

<sup>98</sup> Lucas, *A History of Blacks in Kentucky*, vol. 1, pp. 146-153.

<sup>99</sup> Joseph P. Reidy, "Slave Emancipation Through the Prism of Archives Records," *Prologue*, vol. 29, no. 2 (1997), pp. 105-111.

<sup>100</sup> DuBois, *Black Reconstruction*, 567; see also George C. Wright, *Life Behind a Veil: Blacks in Louisville, Kentucky, 1865-1930* (Baton Rouge, LA.: Louisiana University Press, 1985), p 17.

who became their comrades in arms, male slaves who enlisted in the Union Army and their loved ones who often followed them to army encampments.<sup>101</sup> As a result, Black soldiers and refugees to Union Army camps during the conflict found themselves shunned by Union officers or attacked, mutilated, or whipped by noncombatant Whites.<sup>102</sup>

Given the racial climate in the Commonwealth during the antebellum period, Black business development was impossible for the vast majority of Kentucky's people of African descent. Since slavery was an impediment to the exercise of economic rights, among others, only non-slave Blacks had the potential to build economic institutions or generate and maintain a semblance of wealth. Due to the White hostility and exclusion that they faced, non-slave Blacks in Kentucky fell three generations behind their White counterparts with regard to wealth accumulation and business creation.

#### **D. Reconstruction and the Jim Crow Era**

Like most states, Kentucky was the scene of intense racial tension in the aftermath of the Civil War. Because Kentucky had remained loyal to the Union, the state was not under full federal supervision like its southern neighbors. However, some of the reforms of Reconstruction made their way to the Bluegrass State. Because of the pressure from Blacks for inclusion, as well as the White reactionary impulses to return the state to its antebellum status, Kentucky underwent dramatic, sometimes violent changes that resulted in the implementation of Jim Crow segregation. Although some of the outward manifestations of White Supremacy were not as profound as those in the Deep South, the economic, social, and political transformations left Blacks firmly situated on the bottom rung of the statewide social ladder. Indeed, many of the social trends observable today find their roots in these two periods.

---

<sup>101</sup> As to the limited effect of the Emancipation Proclamation, see Franklin & Moss, From Slavery to Freedom, pp. 207-209; David A. Gerber, "Peter Huggins Clark: The Dialogue of Hope and Despair," in Leon Litwack and August Meier, Black Leaders of the Nineteenth Century (Urbana and Chicago, IL: University of Illinois Press, 1988), pp. 183-184. With specific regard to the concerns of Kentucky slaveholders, see Wright, Life Behind a Veil, pp. 17-19.

## E. Reconstruction

### *Race Relations During Reconstruction*

Kentucky's Reconstruction government was controlled by Democrats, a number of whom were former Confederates or long-time party-members. Shortly after the Confederate surrender at Appomattox, the Kentucky government swiftly moved to repeal any civil disabilities directed at the rebels. The resultant influx of former Confederates into cities like Louisville was quite remarkable.<sup>103</sup> Emboldened by their critical mass and the lack of significant federal or local challenge, those White elites directed their efforts towards circumventing any push for Black political, social, or economic rights. Not surprisingly, the state's legislature refused to ratify the Thirteenth Amendment. As one might imagine, White violence was directed at any Black effort that implied social equality between the races. Indeed, the violence of the period was so widespread that numerous Blacks fled the state for places like Montana.<sup>104</sup>

Kentucky, during the Reconstruction era, was a state strained by competing agendas. The Freedman's Bureau did come to Kentucky and concentrated its efforts on Black education. Yet, even this seemingly benign goal met with incredible White resistance. Whites violently persecuted anyone of any color interested in teaching or learning with African Americans. Accordingly, different White mobs burned buildings owned by Louisville Whites who were prepared to lease the structures to serve as Black schools and sent threatening notes to a teacher in Bowling Green. A young White woman was denied membership in a leading Baptist congregation when it was discovered that she was a northern teacher intent upon educating Black children. Even White children

---

<sup>102</sup> . Lucas, A History of Blacks in Kentucky, vol. 1, pp. 155-158; Reidy, "Slave Emancipation," pp. 108-110, Wright, Life Behind a Veil p. 18.

<sup>103</sup> . George H. Yater, Two Hundred Years at the Falls of the Ohio: A History of Louisville and Jefferson County (Louisville, KY: University of Louisville Press, 1979), p. 95; see also Wright, Life Behind A Veil, p. 21.

<sup>104</sup> . DuBois, Black Reconstruction, pp. 567-568; Christian McMillen, "Border State Terror and the Genesis of the African American Community in Deer Lodge and Choteau Counties, Montana, 1870-1890," *Journal of Negro History*, vol. 79, no. 2 (1994), pp. 212-247.



“habitually cursed and stoned” a teacher at a Freedman’s Bureau school in Crab Orchard.<sup>105</sup>

### *Black Employment and White Violence During Reconstruction*

Although Kentucky’s Blacks found work after the end of the national conflagration, racism prevented them from gaining jobs or self-employment opportunities which easily translated into social and economic mobility. Indeed, Black efforts at self-help were met with threats by elite Whites to employ “Chinese and other foreign labor.”<sup>106</sup> Thus, Black perseverance was geared toward alternative ventures kept secret from most Whites.<sup>107</sup> Not surprisingly, White violence also aimed its venomous claws at Black workers who were paid a decent wage.

In 1868, a mob in Western Kentucky’s Logan County threatened a group of Shaker farmers who hired Black laborers. When the pacifists refused to fire their Black employees, the mob destroyed some of the cabins that housed the workers. Then, in response to the Shakers’ posting of a reward notice for the apprehension of members of the gang, the mob returned and completely destroyed the Shaker’s mill, crippling their settlement.<sup>108</sup> A similar incident was repeated six years later in Shelby County. On this occasion, however, the mob violence did not stop with the destruction of property. One Black farmer’s sixteen year-old daughter was killed instantly by a bullet when she answered the knock at the door by a mob awaiting her father. Tragically, no one was ever arrested or prosecuted for the murder of the young woman.<sup>109</sup>

### *Political Agitation and Reactionary Violence*

---

<sup>105</sup> . Wright, *Life Behind a Veil*, pp. 28-30; C, *Racial Violence in Kentucky*, pp. 34-37.

<sup>106</sup> . DuBois, *Black Reconstruction*, p. 569.

<sup>107</sup> . Wright, *Life Behind the Veil*, pp. 33-34; Dean T. Ferguson, “Living By Means Unknown to Their Neighbors: The Informal Economy of Louisville’s Blacks, 1865-1880,” *Filson Club History Quarterly*, vol. 72, no. 4 (1998), pp. 357-378.

<sup>108</sup> . Wright, “The Forced Removal of Afro-Americans From Rural Kentucky,” p. 2.

<sup>109</sup> . Wright, *Racial Violence in Kentucky*, pp. 31-32.

Perhaps the positive reputation of the city of Louisville emerged in the years directly following the war. After the close of the Civil War, Blacks migrated to Louisville in large numbers in pursuit of educational, occupational, and social opportunities unavailable in other parts of the state or other parts of the South.<sup>110</sup> Even as other Southern states were beginning blanket racial segregation in reaction to both the Black political gains and the economic uncertainty of the period, Louisville's White leadership allowed Blacks some measure of dignity. For instance, during the 1870s and 1880s, White Louisville failed to enact legislation segregating the city's streetcars.<sup>111</sup> Nevertheless, this seeming benevolence was cold comfort for Black communities clearly shunted into the life of outcasts.

The paternalism of some Kentucky Whites could not shield Blacks from all of the evils of the period. For example, state law denied Blacks the right to sit on juries or testify in court. This code was not repealed until consistent pressure was placed on the state government by Black protest and heightened federal intervention into cases involving violations of Black rights by White perpetrators.<sup>112</sup>

Throughout Reconstruction, the principal period in which Blacks began to organize politically, White mob violence blazed across the state, checked only by Black defiance and occasional federal mediation. Historian Allen Trelease has noted that in the four years immediately after the Civil War, the Ku Klux Klan "whipped, shot, hanged, robbed, raped, and otherwise outraged [Blacks] and Republicans across the South in the name of preserving [W]hite civilization."<sup>113</sup> White elected officials throughout the Commonwealth refused to denounce mob violence and the Klan was so strong in fifteen central Kentucky counties that they openly defied Governor Preston H. Leslie's legislative attempt to quell the use of posted threats and the practice of groups of

---

<sup>110</sup> Wright, *Life Behind the Veil*, pp. 44-49.

<sup>111</sup> Ibid., pp. 52-55.

<sup>112</sup> Victor B. Howard, "The Black Testimony Controversy in Kentucky, 1866-1872," in Donald G. Nieman, ed., *Black Southerners and the Law, 1865-1900*, vol. 12 (New York & London: Garland Publishing, Inc., 1994), pp. 162-187; see also DuBois, *Black Reconstruction*, p. 568.

disguised men banding together.<sup>114</sup> The willingness of Kentucky Whites to resort to violence, no different than the impulse in other states, reflected their desperation to maintain untrammelled control over the African Americans who lived with them.<sup>115</sup>

Blacks were lynched for their political activities and were defrauded by Democrats in an effort to diminish their potential electoral clout. To that end, two Blacks were lynched following the "Frankfort riot of 1871" in which a group of Whites was determined to prevent an equally adamant collection of Black men from exercising their right to vote. Although state officials were incensed and embarrassed by the lynchings, their investigations were futile and a separate trial of three Whites from prominent families netted only an acquittal. One year later, Samuel Hawkins, a Black political organizer in Fayette and Jessamine counties, was threatened by Klansmen because of his organizing activities. Refusing to stop trying to register Blacks to vote, Hawkins received a mob visit one November evening. The next morning Hawkins, his wife, and eldest daughter "were found hanging from a tree, suspended over a cliff." The Klan claimed full responsibility for the incident but no one was ever punished, despite scathing editorials and public pronouncements by the state's high-ranking Republicans.<sup>116</sup> Adding insult to injury, race relations began to worsen as the century drew to a close and "Ol' Jim Crow" took flight.

### *The "Nadir" Comes to the Commonwealth*

As in most states during the last two decades of the 19<sup>th</sup> century, Kentucky experienced a sharpening of the racial divide. Blacks faced educational, occupational, and residential segregation, disfranchisement through violence and intimidation, and an

---

<sup>113</sup> . Allen W. Trelease, White Terror: The Ku Klux Klan Conspiracy and Southern Reconstruction (New York: Harper & Row, 1971), pp. xi, 124-125

<sup>114</sup> . Wright, Racial Violence in Kentucky, p. 27.

<sup>115</sup> . See generally George C. Rable, But There Was No Peace: The Role of Violence in the Politics of Reconstruction (Athens, GA.: University of Georgia Press, 1984); Herbert Shapiro, White Violence and Black Response: From Reconstruction to Montgomery (Amherst, MA.: University of Massachusetts Press, 1988).

<sup>116</sup> . George C. Wright, Racial Violence in Kentucky, 1865-1940: Lynchings, Mob Rule, and "Legal Lynchings" (Baton Rouge, LA. And London: Louisiana State University, 1990), pp. 49-52; see also DuBois, Black Reconstruction, 570.

openly hostile legal system that was willing to trade justice and due process for the pacification of white mobs. The larger cities in the Commonwealth were not immune to this groundswell. As noted above, racial discrimination in Louisville was inconsistent, especially when compared to other major Southern cities. For instance, Whites in the city violently opposed Black education but never successfully passed an ordinance segregating public transportation. It would not take long for these contradictions to vanish. "During the 1880s and 1890s, [W]hites took steps to eliminate the inconsistencies, to make racial exclusion more uniform and as complete as possible."<sup>117</sup> This is why noted historian Rayford Logan referred to this period as the "nadir" of the Black experience in America.<sup>118</sup>

#### *Educational Segregation From the Turn of the Century, Forward*

Blacks were excluded from almost all public and private institutions used by Whites. "[B]y the 1880s [Blacks in Louisville] were totally excluded from several [W]hite establishments and welfare institutions where previously they had been admitted."<sup>119</sup> Blacks were prevented from joining White churches, entering theaters or hospitals, riding on railroad cars designated for Whites, or attending baseball games.<sup>120</sup> Even public libraries were established on a racially segregated basis.<sup>121</sup>

Given the violent White reaction to Black education in Kentucky, the appearance of Black schools and continued attempts to educate Black children seemed nothing short of a miracle. "Blacks hoped that their protests would lead to an end of Jim Crow railroads and to equal access to other public accommodations, but they well knew that it was futile to argue for integration in the public schools."<sup>122</sup> Unlike other portions of the state, White elites in Louisville promoted Black education, including the creation of a

---

<sup>117</sup> Wright, *Life Behind a Veil*, p. 50.

<sup>118</sup> See generally Rayford W. Logan, *The Betrayal of the Negro: From Rutherford B. Hayes to Woodrow Wilson* (New York: Da Capo Press edition, 1997).

<sup>119</sup> Wright, *Life Behind a Veil*, p. 59.

<sup>120</sup> *Ibid.*, p. 60-65.

<sup>121</sup> Cheryl Knott Malone, "Louisville Free Public Library's Racially Segregated Branches, 1905-35," *Register of the Kentucky Historical Society*, vol. 93, no. 2 (1995), pp. 159-179.

<sup>122</sup> Wright, *Life Behind a Veil*, p. 65.

Black high school. However, they refused to fund or maintain Black schools in the same manner as White schools and placed restrictions on Black educational achievement, preferring to implement a vocational (rather than a college preparatory) curriculum for Black students.<sup>123</sup> Blacks throughout the rest of the state were lucky to receive even schools for elementary education.

With regard to higher education, Blacks had few options. Berea College admitted Black students as early as 1866. However, the presence of Black students on a predominantly White campus enraged many Whites. By the end of the 19th century, the state legislature passed a law outlawing the education of Blacks and Whites at the same facility. Despite protests from Berea faculty, staff, and students, the United States Supreme Court upheld the notorious “Day Law” in 1904, ending nearly half a century of a semblance of integrated education.<sup>124</sup> Blacks ultimately were limited to all-Black schools like Simmons College and Kentucky State University.

Simmons was the first college founded in the state for African Americans, opening its doors as Kentucky Normal and Theological Institute in 1879. The private church school, conceived and administered by the General Association of Negro Baptists in Kentucky, soon would be joined by the school now known as Kentucky State University. Originally conceived as State Normal School for Colored Persons in 1887, this land grant institution emerged as a place to educate future Black teachers. Because of the onerous provisions of the “Day Law,” Kentucky State was the birth place of thousands of academic, business, and scientific careers. Having grown from the labors and protests of Blacks across the state, the efforts of students, staff, and faculty to maintain and expand the school were heroic and the institution retains its vital function as a haven for Black education in the Commonwealth. In spite of the clear reluctance of

---

<sup>123</sup> Ibid., p. 65-70.

<sup>124</sup> Abraham L. Davis and Barbara L. Graham, *The Supreme Court, Race, and Civil Rights* (Thousand Oaks, CA.; London; New Delhi: Sage Publications, 1995), pp. 26, 53; Richard Sears, *A Utopian Experiment in Kentucky: Integration and Social Equality at Berea, 1866-1904* (Westport, Conn.: Greenwood, 1996); Scott Blakeman, “Night Comes to Berea College: The Day Law and the African American Reaction,” *Filson Club History Quarterly*, vol.

state officials to support Black higher education, these institutions were joined by others, principally the Lincoln Institute.<sup>125</sup>

### *Occupational Segregation, Forced Removal, and the Cost of Gainful Work*

As with education, Black employment opportunities were circumscribed by White whims. Blacks routinely worked the dirtiest, most dangerous jobs available. Numerous business ventures hired Blacks because of labor shortages throughout the period. For instance, mining companies recruited Black workers from various parts of the South. Those mines that hired African American workers often did so in order to provide management with a means of controlling White workers. If the African American miners were not employed as strikebreakers, their low wages depressed the wages of White workers. The racism of most mine managers precluded Blacks gaining positions of any authority or finding opportunities for upward mobility.<sup>126</sup> “The coal operators also chose to recruit [B]lack miners as a means of creating a judicious mixture of [W]hites, [B]lacks, and immigrants, in order to forestall unionization by segregating the men and playing one group off against another.”<sup>127</sup>

In major cities like Louisville, Blacks were clustered in low-paying, unskilled jobs. Many of these positions were in the “personal service industry,” in which Blacks worked as maids, butlers, chauffeurs, and gardeners. Those Blacks who sought non-agricultural work outside of personal service, found steady employment only in those positions which Whites refused. Black women worked as common laborers in laundries and tobacco companies, while their male counterparts worked in sewers and as “track

---

70, no. 1 (1996), pp. 3-26; John D. Smith, “Review Essay: New Scholarship on John G. Fee and the Early Years of Berea College,” *Register of the Kentucky Historical Society*, vol. 95, no. 1 (1997), pp. 79-85.

<sup>125</sup> Lucas, *A History of Blacks in Kentucky*, vol. 1, pp. 123-142 (especially p. 127 which shows the clear disparity in state support for Kentucky State and its all-White peer institutions); Wright, *Life Behind a Veil*, pp. 126-129; John A. Hardin, “Green Pinckney Russell, Francis Marion Wood, and Kentucky Normal and Industrial Institute, 1912-1929: a Study in Politics and Race,” *Filson Club History Quarterly*, vol. 69, no. 2 (1995), pp. 171-188.

<sup>126</sup> Eller, *Miners, Millhands, and Mountaineers*, pp. 165-175.

<sup>127</sup> Eller, *Miners, Millhands, and Mountaineers*, p. 171.

men” for the railroad. Perhaps the greatest cruelty of the isolation of Black labor to such dangerous, dirty, and unfulfilling work was that Louisville had a long tradition of Black skilled workers dating back to the antebellum period. Despite encouragement by Black leaders who followed the teachings of Booker T. Washington (and even the support of a few White elites) the number of Black skilled workers in Louisville declined precipitously following Reconstruction. Discrimination by employers, as well as exclusion by White-controlled labor unions were the greatest factors in this decline.<sup>128</sup>

Self-employment was another alternative which Black workers explored. The most successful Black enterprises were those which depended heavily upon a White clientele. Black-owned furniture dealers and barbers thrived in downtown Louisville because they provided “high-end” goods and services to wealthy Whites. Generally, Black businesses that survived the risks of the start-up period usually catered to a strictly Black customer base. Too often, however, Black-owned businesses failed because of insufficient capital, insufficient patronage, or technological changes for which they were too cash-strapped to adapt. Even Black professionals struggled in a city that attracted African American doctors and lawyers from around the country. Those professionals who survived usually did so by taking on additional employment or becoming active in the Republican Party, avocations that were draining, time-consuming, or life threatening.<sup>129</sup>

One of the surest ways to excite the violent passions of the White community was to be an African American employed in a position which was in direct competition with Whites or which supposedly was “too good” for a Black person to have. On March 23, 1908, a man named Tom Weaver was lynched simply because he had migrated to Trigg County to pack tobacco for several large companies.<sup>130</sup> During the infamous Black Patch War, Night Riders took advantage of the chaotic situation in Western Kentucky to attack people unconnected with the tobacco controversy. John Manning, a White farmer, had

---

<sup>128</sup> . Wright, *Life Behind a Veil*, pp. 77-93.

<sup>129</sup> . *Ibid.*, pp. 93-101.

his home riddled with bullets because he refused to fire his Black workers. The Night Riders also attacked Black coal workers in Hopkins County. They threatened other White employers and whipped 10 men, both White and Black, who had criticized their raids.<sup>131</sup>

White vigilantes terrorized Black farmers and workers in Marshall County in February and March of 1908. Some of the Blacks in the town of Birmingham worked for a local tobacco venture. The Black farmers, much to the chagrin of many Whites, occupied what was considered some of the best farming land in the entire Jackson Purchase. Following one of the mobs' raids, a sign was found near the Marshall County railroad station which read "Niggers Don't Let the Sun Set On You." Nearly the entire Black population of the county fled to places like Paducah and Nashville, Tennessee, leaving household goods and farming equipment behind.<sup>132</sup>

Following World War I, the Louisville and Nashville Railroad Company in Corbin hired a number of Black men as skilled laborers. On October 30, 1919, a White mob decided to expel all Blacks from the town in response to the robbery and stabbing of a White night watchman allegedly by two Blacks. The armed hooligans forced the more than 200 Black workers onto trains leaving town. The only African American families that were spared were those of "good niggers" who had worked for decades as servants.<sup>133</sup>

### *Political Violence: The Price of a Constitutional Right*

Throughout the Nadir, White attacks on Black political organization and agitation remained a sobering fact of life. One of the early martyrs of the movement for Black uplift was Robert C. O. Benjamin. Benjamin had worked as a lawyer and journalist for most of his adult life before he arrived in Lexington in the mid-1890s. Upon migrating to

---

<sup>130</sup> Ibid., p. 123.

<sup>131</sup> Wright, "The Forced Removal of Afro-Americans From Rural Kentucky," p. 3.

<sup>132</sup> Wright, "The Forced Removal of Afro-Americans From Rural Kentucky," pp. 3-4.

<sup>133</sup> Ibid., pp. 4-5.



Kentucky, Benjamin immersed himself in the newspaper business and in Republican politics.

On the morning of October 2, 1900, Benjamin confronted a white man named Michael Moynahan who consistently harassed Blacks who attempted to register to vote. Moynahan concluded the argument by pistol-whipping Benjamin. Although Benjamin pressed charges and Moynahan was arrested, the latter was released from jail within an hour. Upon leaving his cell, Moynahan hid himself in an alley near Benjamin's house, in an attempt to ambush him. As he walked home that evening, Benjamin saw Moynahan and fled. Moynahan fired his weapon at Benjamin, slaughtering the activist in a hail of gunfire. Moynahan escaped prosecution because the presiding judge at his examining trial accepted his claim of self-defense.<sup>134</sup> Two decades later, Benjamin's spirit emerged in the work of the Lincoln Independent Party (LIP).

For decades, Blacks had provided solid support for the Republican Party in Louisville. African Americans had little use for the Democratic Party because it had been the party of secession and openly advocated racial segregation. However, by the early 1920s, many Blacks had become disenchanted with Republicans whom they believed took for granted the support of the Black community. After White Republicans refused to support the state house bid of Wilson Lovett, he and other young politicians joined forces to form the LIP. "This condition of political slavery has placed us in the very unenviable position of being owned by the Republicans and being hated by the Democrats," wrote A. D. Porter. The formation of the LIP caused an angry schism within the leadership ranks of the Black community, resulting in mob violence by Black supporters of the local political machine. Crowds of Blacks who considered the LIP members to be traitors smashed their businesses and disrupted their meetings. Police raided LIP gatherings and dispersed those in attendance, arguing that the presence of LIP members was a threat to

---

<sup>134</sup> . Wright, *Racial Violence in Kentucky*, pp. 296-297.

public safety. If the police arrested any of the protesters, they were never thrown in jail. Facing hostility from Whites and Blacks alike, the LIP quickly disbanded.<sup>135</sup>

*The Spillover: White Mob Violence As A Tool of Social Control*

The violence perpetrated against Blacks had both economic and political overtones. Not only were Blacks lynched or attacked by mobs or murdered by a single assailant, they were forced at gunpoint to abandon gainful employment, farming land that they owned or thriving communities that they built.<sup>136</sup> Historian George C. Wright's assessment provides an apt summation of the problem:

The practice of forcing [B]lacks to leave an area occurred on many different occasions between the 1880s and 1930s...Whites rarely acknowledged publicly the two leading reasons for forcing [B]lacks out of their communities: They resented [B]lack involvement in politics, especially in the Republican party, and they felt threatened by the presence of [B]lacks as successful farmers or as skilled, competitive workers.<sup>137</sup>

However, it would be an overstatement to suggest that White violence against Blacks only had economic or political motives. Chief among the concerns of White vigilantes, peace officers, or judges was the maintenance of a White Supremacist social order with Blacks firmly ensconced at the bottom. As a result, lynchings and "legal lynchings" further terrorized Black communities.

---

<sup>135</sup> Ibid., pp. 249-252.

<sup>136</sup> For a personal account of this drama, see the documentary film *Evelyn Williams* by Anna Lewis. The protagonist of the piece is a Black woman named Evelyn Williams who grew up the daughter (and, later, wife) of a coal miner who lived in Eastern Kentucky. The film examines the migration of Williams and her husband out of Kentucky, into West Virginia, then to New York, and, eventually, back to Kentucky. *Evelyn Williams* is being screened across the country as part of the "Voice From Home" national tour conducted by the "Appalshop" arts collective, based in Whitesburg, Kentucky. The tour is funded, in part, by the National Endowment for the Humanities and the National Endowment for the Arts.

<sup>137</sup> Wright, *Racial Violence in Kentucky*, p. 131.

The myths of Southern culture inform us that Black men were lynched for raping or assaulting White women. Yet, in no decade did the percentage of lynchings based upon accusations of sexual assault ever exceed 33%.<sup>138</sup> The savagery of lynchings was exacerbated by the fact that victims of mob murder often were determined guilty based upon little or no evidence, testimony based upon leading questions, or unsubstantiated rumor. At times, even the White women who claimed that Black men had attacked them had second thoughts about their assertions or, in reality, had engaged in consensual affairs with the accused. Furthermore, the outrage of lynchings concealed the reality that White men sexually abused Black women with impunity.<sup>139</sup>

Although Blacks were lynched for murder or attempted murder at roughly the same rate they were lynched for sexual assault, the largest proportion of Black victims were lynched for various “crimes” which are not easily categorized. As in other Southern states, Kentucky’s history suggests that Blacks most often were lynched for relatively trivial offenses like quarreling with or talking back to Whites, horse stealing, or supposedly being “known criminals.”<sup>140</sup>

Obviously, Blacks lynched by angry mobs were denied their due process and other rights entitled by law to any citizen accused of a crime. Undoubtedly, impartial trials of lynching victims would have reduced the number of those sentenced to death because of the flimsy nature of the evidence.<sup>141</sup> Though nothing can compare to the horrific spectacle of lynching, the phenomenon of “legal lynchings” placed a tragic second.

This phenomenon involved the intervention by law enforcement officers or judges in a would-be lynching. These members of the legal system quieted the mob by insuring a speedy trial with a guilty verdict and a sentence of death. In this way, they preserved

---

<sup>138</sup> Ibid., pp. 76-95, 106.

<sup>139</sup> Wright, *Racial Violence in Kentucky*, pp. 79-80, 107-115; see also Paula Giddings, *When and Where I Enter: The Impact of Black Women on Race and Sex in America*, (New York: Bantam Books, 1985), pp. 30-31, 85-88.

<sup>140</sup> Giddings, *When and Where I Enter*, pp. 26-31 (for an examination of the research findings of world-famous journalist and activist Ida B. Wells-Barnett with regard to lynchings at the turn-of-the-century); see also Wright, *Racial Violence in Kentucky*, pp. 76-79.

the reputation of their town or jurisdiction, though the outcome was essentially the same as mob murder.<sup>142</sup>

Finally, police abuse and brutality were an ever-present phenomenon for Blacks living in urban areas. "Louisville's police had always taken seriously its mandate to control the Negro."<sup>143</sup> With respect to armed terrorism of Black populations, the police baton swung where the Night Riders' rope ended.

Although police abuse of African Americans in Louisville has been documented as far back as the 1880's, it seemed to find fresh legs in the "roaring twenties." It is ironic that this period had struggles between the Black community and the police, since Louisville's police department had just begun hiring Black officers and Blacks enjoyed limited political patronage as reward for their Republican loyalty. Despite a succession of Republican mayors whom Blacks had openly supported, Black frustrations with the city's law enforcement officers reached a boiling point at a time of supposed progress. In 1923, the director of the Commission on Interracial Cooperation wrote:

The fact is that the beating and shooting up of Negroes by police seems to have become so common under the present administration in Louisville that it has developed into a kind of sport or pastime and is written up by the reporter in much the same way that a chase of a rabbit through the city would be written up.<sup>144</sup>

According to one source, at least seventeen African Americans were killed by police officers during the 1920s. Although the officers regularly were exonerated, many witnesses described all-too-familiar scenes of murder in the streets.

In October 1924, policeman Charles Hazel killed James Emery as he emerged from a stolen car. According to witnesses, Emery was unarmed and made no attempt to resist arrest...Patrolman W. E. Pemberton shot

---

<sup>141</sup> Wright, *Racial Violence in Kentucky*, pp. 79-80.

<sup>142</sup> See generally Perry T. Ryan, *Legal Lynching: The Plight of Sam Jennings* (Lexington, KY.: Alexandria Press, 1989)

<sup>143</sup> Wright, *Life Behind a Veil*, p. 76.

<sup>144</sup> Ibid., p. 248-249, 254.

two [B]lacks on the evening of October 15, 1925; he killed a youth running from a dice game, and later that evening he shot a man for leaving a store with stolen merchandise. Both victims were unarmed. On one occasion, a [B]lack “Good Samaritan,” attempting to catch a [W]hite burglar, was shot and killed by an off-duty policeman.<sup>145</sup>

Although the din of Black protest was enough to force the police board to suspend five officers after the savage beating of Lawrence Day in 1928, it seemed that the increased violence, again, was a response to the small strides made by African Americans. Police violence against Blacks represented more than the abuse of power; it was yet another reminder that Blacks had little protection against White rage and insecurities.<sup>146</sup>

### *Residential Segregation and Official Neglect of Black Communities*

Throughout rural Kentucky, Blacks lived in enclaves physically separated from White communities.<sup>147</sup> In the major cities, Blacks were restricted to ghettos with names like “Smoketown.” Even Blacks who worked alongside Whites resided in segregated facilities.

Throughout Reconstruction and, particularly, the Nadir, Black farmers and agricultural workers lived in same-race enclaves in their counties of residence. In urban areas, Blacks found little respite from this form of exclusion. Immediately following the Civil War, Blacks who migrated to Louisville and Lexington, were restricted to outlying areas or tightly packed Black neighborhoods of long-time residents. However, Blacks lived in many different parts of Louisville up to World War I, including on the same streets as Whites. Nevertheless, the wave of White resentment eventually caught up with this contradiction as well.

Although some Louisville Blacks lived in predominately White census tracts, most of them worked for these Whites. In this way, the proximity of their residences to

---

<sup>145</sup> Ibid., p. 255.

<sup>146</sup> Ibid., pp. 256-257.

<sup>147</sup> See, e.g., Wright, “The Forced Removal of Afro-Americans From Rural Kentucky,” p. 3.

White homes is analogous to slave quarters near White plantation dwellings. In truth, by the 1920s, most Blacks in Louisville lived within a well-defined area in the center of town. Slowly, Black neighborhoods like Chestnut Street and Smoketown, founded in the second decade of the 20<sup>th</sup> century became primary residential areas for the Black community. These areas consisted largely of run-down neighborhoods caused not by Black depravity but by official neglect. Despite the best efforts of Black residents, their neighborhoods had the fewest (and lowest-quality) municipal services and often encompassed “red light districts” which attracted criminals, gamblers, and drug abusers of all skin colors.<sup>148</sup>

The greatest potential for change came with the United States Supreme Court decision in *Buchanan v. Warley*.<sup>149</sup> When Whites in Louisville finally succeeded in passing a neighborhood segregation ordinance, Black activists took to the courts. Attorneys from the National Association for the Advancement of Colored People (NAACP) worked with William Warley to challenge the zoning law.<sup>150</sup> When the Kentucky courts upheld the ordinance, the NAACP appealed the case to the highest court in the land. Although lawyers defending the ordinance quoted freely from the rulings in *Berea* and *Plessy v. Ferguson*<sup>151</sup>, the Supreme Court held that Louisville’s ordinance was an illegitimate exercise of police powers and violated the due process clause of the Fourteenth Amendment.<sup>152</sup>

Despite the favorable decision, the reality of White enmity for Blacks dimmed any hopes for residential integration. White communities began to use contract provisions, which prohibited homeowners from selling their homes to non-Whites, as a means to enforce residential segregation. If restrictive covenants failed, simple harassment sufficed to freeze out potential Black homebuyers from White neighborhoods.<sup>153</sup>

---

<sup>148</sup> . Wright, *Life Behind a Veil*, pp. 102-118.

<sup>149</sup> . 245 U.S. 60 (1917).

<sup>150</sup> . Wright, *Life Behind a Veil*, pp. 233-235.

<sup>151</sup> . 163 U.S. 537 (1896).

<sup>152</sup> . Davis and Graham, *The Supreme Court, Race, and Civil Rights*, pp. 66, 91-92.

<sup>153</sup> . Wright, *Life Behind a Veil*, pp. 236-237.

When large industrial concerns recruited Black workers, they established separate living facilities for non-Whites. For instance, the investors in the Dix River Dam project in Mercer County confronted a labor shortage by attracting more than 800 Black men to the site. Although the Black workers were highly valued by their employers, they lived, drank, and gambled on a segregated basis.<sup>154</sup> Pioneering coal operators created inexpensive communities to house their workers. Sadly, their Black workers were confined to the worst, most environmentally hazardous housing in these camps.<sup>155</sup>

### *The Ramifications of the Failed Revolution on Black Wealth*

The Union Army's defeat of the Confederacy did more than end bondage in America. Field orders by Union commanders that granted seized lands to ex-slaves whetted the Black appetite for some form of reparation for the hundreds of years of slavery.<sup>156</sup> During and after Reconstruction, Blacks throughout the South continued to wait for their "forty acres and a mule." Unfortunately, the massive land redistribution anticipated at the close of the war failed to significantly improve the lives of Blacks.

This social and economic transformation never occurred. The Southern Homestead Act [of 1866] failed to make newly freed [B]lack into a landowning class...First, instead of disqualifying former Confederate supporters as the [1862 Homestead Act] had done, the 1866 legislation allowed all persons who applied for land to swear that they had not taken up arms against the Union or given aid or comfort to the enemies. This opened the door to massive [W]hite applications for land. One estimate suggests that over three-quarters (77.1%) of the land applicants were [W]hite. In addition, much of the land was poor swampland and it was difficult for [B]lack and [W]hite applicants to meet the homesteading requirements because they could not make a decent living off the land.<sup>157</sup>

---

<sup>154</sup> Wright, "Forced Removal of Afro-Americans From Rural Kentucky," pp. 6-7.

<sup>155</sup> Eller, Miners, Millhands, and Mountaineers, pp. 163-171.

<sup>156</sup> See, e.g., Joel Williamson, After Slavery: The Negro in South Carolina During Reconstruction, 1861-1877 (Hanover, NH and London: University Press of New England edition, 1990).

<sup>157</sup> Oliver and Shapiro, Black Wealth/White Wealth, p. 14.

If we add to that the litany of mob violence, forced removal, judicial hostility, and political indifference, then one can see how the widespread accumulation of Black wealth was next to impossible in Kentucky during the Reconstruction and Nadir periods.

As a result of the Great Depression, the federal government expanded its role to provide assistance to the poor and unemployed. One way that President Franklin D. Roosevelt aided families in financial distress was by creating the Home Owners Loan Corporation (HOLC), which refinanced tens of thousands of mortgages perilously close to foreclosure. Alongside the Federal Housing Authority (FHA), federal initiatives spurred the explosion of single-family detached homes in suburban areas of the nation's cities. Based upon the acceptance of racial segregation by the White power structure, Whites prevented Blacks from exploiting the most significant trend in home ownership in the history of the nation. Through the HOLC appraisal system and the FHA "Underwriting Manual," Blacks were excluded from the highly valued White suburbs.<sup>158</sup> Although scholars have not measured the exact amount of the wealth created exclusively for Whites by the discriminatory practices of the federal government, one estimate measures the White advantage over Blacks in the trillions of dollars.<sup>159</sup>

Of equal import was the establishment of the Social Security Administration and its policies for funding retirements. The Social Security system was designed to provide a source of funds to sustain workers upon their retirement. However, agricultural and many unskilled workers were not covered by the system. Occupational segregation forced Blacks into many such jobs. Thus, even as Black workers' taxes (paid at a flat rate, which meant they also dispensed proportionately more than White workers) contributed to the pool of funds, these workers were destined to receive little or no benefit. Compounding this affront is the fact that Blacks have a shorter life expectancy than Whites. Given these realities, as well as tax advantages for white-collar workers that

---

<sup>158</sup> . Ibid., pp. 16-18.

<sup>159</sup> . Tim Wise, "Racism and Preferential Treatment By the Numbers," *Z Magazine - Z Net Commentary*, March 13, 1999, pp. 4-5 (where the author estimates that the value of the suburban homes purchased by discriminatory financing practices is roughly \$10 trillion).



did not inure to blue-collar laborers, Blacks proportionately paid more into the government coffers than they ever received.<sup>160</sup> Even at a time of unprecedented government assistance to America's workers, racism stymied Black wealth accumulation.

## F. The Civil Rights Era and the Push Toward Power Sharing

### *Eyes on the Prize: The Black Quest for Self-Determination*

Even as Kentucky's African Americans continued to contribute to the goal of racial justice on a local or national level, changes in race relations within the state were not in the offing until the 1950s.<sup>161</sup> The United States Supreme Court decision in *Brown v. Board of Education*<sup>162</sup> is often considered the demarcation of the modern civil rights movement in this country. Blacks in Kentucky knew that they faced numerous obstacles to implement *Brown*, the least of which being the sentiment "of school officials and political leaders that desegregation should not go forward until [W]hite approval had been obtained for each step in the process."<sup>163</sup> African Americans also knew that desegregating schools was simply one aspect of a larger war against White Supremacy. What Blacks did not realize was the length and intensity of the fight for racial justice, not to mention the anxiety and doubt as to the nature of their "victory."

Despite the aforementioned triumph over the segregation ordinance, Louisville, like the rest of Kentucky, was thoroughly segregated in the 1950s. The first hints of the Black challenge emerged in Louisville in 1953 as a court victory ended segregation in public parks and a small protest movement gradually transformed the city's transportation

---

<sup>160</sup> . Oliver and Shapiro, *Black Wealth/White Wealth*, pp. 38-39.

<sup>161</sup> . See, e.g., Jeanne C. Schmitzer, "CCC Camp 510: Black Participation in the Creation of Mammoth Cave National Park," *Register of the Kentucky Historical Society*, vol. 93, no. 4 (1995), pp. 446-464; William M. King, "Hubert Branch Crouch and the Origin of the National Institute of Science," *Journal of Negro History*, vol. 79, no. 1 (1994), pp. 18-33.

<sup>162</sup> . 347 U.S. 483 (1954).

<sup>163</sup> . Wright, *A History of Blacks in Kentucky*, vol. 2, p. 193.

policy.<sup>164</sup> Most Whites in the state believed, however, that racism was on the decline and that race relations had improved. In fact, some argued that segregated schools were a benefit to both Blacks and Whites.<sup>165</sup> By 1960, full-scale protest regarding the demand to integrate public facilities had begun. Even though political officials in large cities like Louisville offered stiff resistance, Blacks only strengthened their resolve. After more than 600 arrests of demonstrators, the city's mayor grudgingly supported the integration of public facilities downtown.<sup>166</sup>

Because the Black population was concentrated heavily in a handful of counties, militant activism was uneven across the Commonwealth. Blacks in some rural areas and towns like Henderson, Hopkinsville, and Madisonville were reluctant to join in the wave of dissent for fear of White reprisals, mainly of an economic nature. One reason for such timidity was the clearly demonstrated intransigence of Whites. For instance, the White-dominated school board in Shelbyville flatly told NAACP representatives that they had no plans to integrate the schools within their jurisdiction. However, generalizations about the fears of Blacks in smaller urban centers would be unfair. Indeed, the enthusiasm of African American activists in places like Paducah, Fulton, Hazard, and Princeton matched the zeal of their counterparts in Lexington and Louisville.<sup>167</sup> Interestingly, the most violent White reactions to the Black demand for inclusion occurred in the state's largest city.

The slow pace of school integration in Louisville was caused both by historically segregated housing patterns and the refusal of White parents to send their children to schools with non-White children. Enrollment at private and parochial schools mushroomed as Whites used their wealth or religious affiliations to subvert social change. By 1972, when the state's human rights commission issued a pessimistic report about the

---

<sup>164</sup> . Scott Cummings and Michael Price, "Race Relations and Public Policy in Louisville: Historical Developments of An Urban Underclass," *Journal of Black Studies*, vol. 27, no. 5 (1997), p. 631.

<sup>165</sup> . Wright, *A History of Blacks in Kentucky*, vol. 2, pp. 194-197.

<sup>166</sup> . Cummings and Price, "Race Relations and Public Policy in Louisville," pp. 631-632; Wright, *A History of Blacks in Kentucky*, vol. 2, pp. 211-218.

<sup>167</sup> . Wright, *A History of Blacks in Kentucky*, vol. 2, pp. 199-201.

progress of integration, transporting Black students to White schools seemed to be the only solution to White resistance. When busing began in earnest in 1975, Whites violently protested integration, marring the image of the city and making it the subject of national attention.<sup>168</sup>

### **Reconstruction Redux: White Backlash and the Aftermath of Agitation**

As a result of generations of exclusion, violence, and discrimination, Blacks in Kentucky lived in the shadows of White Kentucky. Undoubtedly, the modern civil rights movement achieved certain tangible victories for African-American dignity and power sharing in the Commonwealth. However, some battles were difficult to win because social and demographic trends proved stubborn or irreversible. Consequently, Black business development remained problematic.

As Black activists marched to protest oppression, the trend toward Black urbanization caused by White Supremacy had already taken hold. Given the realities of forced removal in rural Kentucky, most Blacks chose to live in urban areas as protection from mob violence or for increased employment opportunities, among other things. By 1970, 81% of Black families lived in the urban areas of the Commonwealth.<sup>169</sup>

Even as Black political agitation took to new heights, federal and state reforms offered only slight relief to Black problems. According to census data from 1960 and 1970, Blacks existed at the margins of economic and social life in the Commonwealth. Although there was some improvement in income levels for Blacks, most Blacks were distributed among the lowest earnings tiers. In 1960, 84.4% of Black families took home

---

<sup>168</sup> . Wright, *A History of Blacks in Kentucky*, vol. 2, pp. 209-211.

<sup>169</sup> . This figure was extrapolated from "Table 58 - Poverty Status in 1969 of Families and Persons by Race and Urban and Rural Residence: 1970," United States Survey of General Social and Economic Characteristics (Kentucky), p. 19-222. The first line of the table indicates that of the 49,991 "Negro" families in Kentucky, 40,460 reside in urban homes.

less than \$5,000 in yearly income. Ten years later, nearly the same proportion (roughly 83%) of Black families took home less than \$10,000.<sup>170</sup>

The accumulated wealth among Blacks doubtlessly remained trivial because most of Kentucky's African-American families hovered near the national poverty line. For instance, the federal poverty level for families in 1969 was \$3,743. According to the survey of poverty status, nearly half of African American families earned less than \$4678.75 per year.<sup>171</sup>

Even when the Commonwealth experienced dynamic economic growth, African-American workers did not receive their share of the bounty. Certainly, large manufacturing concerns like General Motors and International Harvester hired Blacks in unprecedented numbers. Yet, Black incomes consistently fell short of those for Whites.<sup>172</sup> Progress toward economic equality in Kentucky, though better than in some Southern states, lagged behind its Northern neighbors.<sup>173</sup>

The hiring of Black workers in many private and public entities seemed more like tokenism than a wholesale commitment to diversity. The fact that Blacks in the 1960s and 70s earned roughly two-thirds of the pay Whites took home for the same work, blunted any optimism about equal opportunity.<sup>174</sup> Indeed, racism turned seeming triumphs into depressing conundrums.

---

<sup>170</sup> "Table 47 - Industry and Income By Race: 1970 and 1960," United States Survey of General Social and Economic Characteristics (Kentucky), p. 19-201 [from the State Data Center, University of Louisville].

<sup>171</sup> "Table 58 - Poverty Status in 1969 of Families and Persons by Race and Urban and Rural Residence: 1970," United States Survey of General Social and Economic Characteristics (Kentucky), p. 19-222 (where the survey indicates that 43% of "Negro" families earn an "income less than 125 percent of poverty level"); United States Department of Health and Human Services website devoted to poverty guidelines, "Historical Poverty Tables," p. 1 of 4 (this table provides weighted average poverty thresholds from 1959 to the present).

<sup>172</sup> Wright, *A History of Blacks in Kentucky*, vol. 2, pp. 196-197.

<sup>173</sup> See Verna M. Keith, *Changing Socioeconomic Status Differences Between Blacks and Whites, 1960-1970, in Three States: Alabama, Kentucky, and Ohio* (Lexington, KY: University of Kentucky Master's Thesis, 1979).

<sup>174</sup> Wright, *A History of Blacks in Kentucky*, vol. 2, pp. 223-226.

As Black agitators pressed for school desegregation, White administrators reacted by closing Black schools and dismissing Black teachers and principals. These administrators insisted that Blacks were not competent to instruct White children and that White parents would not tolerate their children laboring under Black supervision. Interestingly, Louisville, the city that claimed to treat its Blacks so fairly, had a worse record for hiring Black teachers for White schools than Jackson, Mississippi, Birmingham, Alabama, or Columbia, South Carolina. Even as activists proved that, on the whole, Black teachers were more qualified than their White counterparts, thousands of Black educators vanished from the state's school systems. This form of exclusion mirrored the pattern established in the 19<sup>th</sup> century when Whites actively prevented Blacks from learning or working in skilled trades and crafts.<sup>175</sup>

With respect to residential segregation, Blacks made limited gains toward integration. In 1954, Whites violently opposed the sale of a house in Shively, an all-White suburb of Louisville, to African American Andrew Wade. Because of the unspoken restrictive covenants which littered Louisville, a White couple, Carl and Anne Braden, purchased a home in Shively and sold it to Wade. When White neighbors discovered that Wade, not the Bradens, lived in the house, they sued the Bradens and attacked Wade, physically and economically. Ultimately, on June 27<sup>th</sup>, a bomb substantially destroyed Wade's residence, forcing him from the neighborhood. Carl Braden was arrested because officials claimed that he and his wife employed the explosive in order to win sympathy for their cause. Braden was sentenced to fifteen years in prison and a \$5,000 fine under an anti-secession law even though all of Wade's neighbors had been warned and therefore evacuated their homes on that fateful evening. Though most Blacks did not endure Wade's suffering, they faced the dogmatic intransigence of politicians and realtors determined to evade open housing edicts.<sup>176</sup> Herein lies the local facet of the most recent national economic event that adversely effected Blacks.

---

<sup>175</sup> . Ibid., pp. 197-209.

<sup>176</sup> . Ibid., pp. 220-223.

The late 1970s and early 1980s witnessed an explosion of housing prices across the country. Although certain regions experienced greater increases in housing costs, homeowners in all states benefited from this inflation. As property values soared, so did homeowners' equities. Unfortunately, because Blacks had been trapped in neighborhoods with sub-standard housing or because their homes were "red-lined" by banks and insurance companies, the increase in value of Black-owned homes paled in comparison to those owned by Whites. Housing inflation had an equally discriminatory effect on Black homebuyers.

Because of exorbitant prices, Black homebuyers often lacked the resources to purchase homes in the last two decades of the century. Yet, those who had the wherewithal to purchase a home were denied mortgages at a higher rate than similarly situated White applicants. To compound this crime, potential Black homebuyers then turned to secondary mortgage lenders who charged much higher rates than leading banks. It is estimated that African Americans lost \$82 billion in assets as a result of this type of institutional racism.<sup>177</sup>

The most recent organized assault on White Supremacy was a milestone in American history. It dramatically questioned Whites' assumptions about Blacks, in particular, and race relations in general. It witnessed the transition in Black-White social interactions as Blacks moved into places previously forbidden to them and Whites openly enjoyed and consumed Black culture. Yet, the ambivalence of the period is reflected in the story of a young Black man at the University of Kentucky at the end of the 1970s. As an incoming-freshman, Frank X. Walker walked where few Black student feet had trod. Yet, his elation was dampened when he found the burnt figure of a cross in the rug outside his dormitory room door in 1979.<sup>178</sup>

---

<sup>177</sup> . Oliver and Shapiro, Black Wealth/White Wealth, pp. 136-151 (especially p. 151, Figure 6.4; the authors estimate that the "price of being Black in the housing and mortgage markets" will rise to \$93 billion for the next generation of African Americans).

<sup>178</sup> . Sargent, "Renaissance Man," p. 4 of 11.

***The Continuing Significance of Race With Regard to Black Wealth and Public Contracting***

Despite the gains of the recent period of activism, African Americans in Kentucky find themselves confronting age-old problems in new guises. The shooting of Fidencio Campos-Cruz and the jailhouse death of Adrian Reynolds, both in 1998, bear witness to the fact that people of color remain targets of seemingly inexplicable police violence.<sup>179</sup> The extreme concentration of African Americans in the Commonwealth's cities appears to be a new-age spatial segregation. Moreover, the intractable gap between Black and White incomes, as well as the inability of most Blacks to find jobs with mobility potential or learn skills for the changing workplace are reminiscent of the White proscriptions on Black labor in the 19<sup>th</sup> and early 20<sup>th</sup> century. The current frustrations of potential Black contractors with state government must be viewed within this context.

Last Spring, Governor Paul Patton signed an executive order banning racial profiling by all of the state's law enforcement agencies. Although the move was applauded in some quarters, only time will reveal its effectiveness in halting police abuse and brutality of non-Whites. Equally significant in this regard will be the outcome of a lawsuit filed in United States District Court against Lexington police by a Black doctor and her nephew.<sup>180</sup> The police-shooting death of Clifford Lewis on January 9<sup>th</sup> of this year does not bode well for the future.<sup>181</sup>

At present, the overwhelming majority of Blacks reside in a handful of Kentucky counties. According to information from the Kentucky State Data Center, the estimated Black population of the state (as of July 1, 1999) was 288,336. Of that number, 59.6% reside in Jefferson, Fayette, and Christian counties. If one adds the 7,587 Blacks who live

---

<sup>179</sup> . Stolen Lives Project, Stolen Lives: Killed By Law Enforcement (New York: October 22<sup>nd</sup> Coalition, 2<sup>nd</sup> edition, 1999) p. 182.

<sup>180</sup> . John Cheves, "Justice Sets Policy On Race Profiling," *Lexington Herald-Leader*, August 25, 2000, on-line version; C, "Patton Orders State Law Enforcers To End Racial Profiling," *Lexington Herald-Leader*, April 22, 2000, on-line version.

<sup>181</sup> . Darla Carter, "Officials Urge End to Rhetoric On Shooting," *Louisville Courier-Journal*, January 13, 2001, on-line version.

in Warren County, the proportion of Blacks in these urban centers rises to 62.2%. Each of these counties are home to some of Kentucky's largest cities: Louisville, Lexington, Hopkinsville, and Bowling Green, respectively.

Black business development has shown promise. Louisville's West End is one such zone of hope.

Minority merchants and investors have attempted to revitalize business activities along West Broadway, the major commercial corridor in the West End. An emerging historic preservation movement has been stimulated in the Russell neighborhood (also located in West End) by minority developers and professionals. The once-famous Black entertainment and commercial district on Walnut Street, leveled by Urban Renewal in the 1960s, has been placed in the city's enterprise zone and is slowly being redeveloped. Minority contractors have benefited from set-aside programs associated with downtown redevelopment, and the Presbyterians have awarded close to \$1 million to minority firms and vendors for renovation of their New World headquarters.<sup>182</sup>

Nevertheless, Louisville faces a stark future as its urban "underclass" expands.

A comparison of Louisville with other middle-sized cities reveals the seriousness of its growing urban underclass. In comparison to nine similar cities (Buffalo, Cincinnati, Columbus, Indianapolis, Kansas City, Milwaukee, Pittsburgh, Providence, and Rochester), Louisville consistently reveals higher levels of poverty and unemployment and lower levels of educational attainment for both Blacks and Whites.<sup>183</sup>

Although Blacks have made gains from the first half of the 20<sup>th</sup> century, occupational segregation persists throughout the Commonwealth. If, as recent scholarly research suggests, the rate of start-up businesses is influenced by wealth creation and social mobility, increased occupational mobility for Blacks might foreshadow the creation of more Black-owned businesses. Based upon statistics compiled by the State Data Center at the University of Louisville, Blacks remain clustered in low-paying jobs and represent a disproportionately low percentage of professional and managerial workers. As such, Black business growth is hamstrung by trends established over a century ago.

---

<sup>182</sup> . Cummings and Price, "Race Relations and Public Policy in Louisville," pp. 642-643.



Data from the 1980 census indicates that Blacks were approximately 7.1% of the Commonwealth's population.<sup>183</sup> Yet, according to the 1980 Equal Employment Opportunity Report, Blacks only made up 2.9% of workers classified as "executive, administrative, and managerial" employees. Blacks constituted just 3.6% and 4.5% of workers in "precision production, craft and repair" and "professional specialty" jobs, respectively. On the other hand, Blacks comprised 7.8% of "protective service" (fire fighters, law enforcement officers, etc.) employees. Specifically, Blacks made up 18.5% of janitors and cleaners, 14.3% of manufacturing laborers, and 9.2% of private household child care providers. Yet, only 2.4% of the state's electricians and 2.1% of the state's carpenters were African American. Although 9% of the students enrolled in Kentucky high schools were African American, only 4.7% of secondary school teachers were Black. With regard to professional or high status jobs, Blacks were 2.3% of all financial managers, 1.6% of all physicians, and nine-tenths of 1% of all lawyers within the Commonwealth.<sup>185</sup> The figures on personal income and family finances also are astounding.

In 1980, the median income for families in Kentucky was \$16,444, while the mean (i.e., average of all families) income was \$19,192. The mean income for Black families was a meager \$13,917 or roughly 71.3% of the White family average income of \$19,519. The \$5,602 difference between the average income of Black and White families is quite significant with household revenues at such low levels, but is more appalling when one considers that the average Black family income fell \$2,527 below the mid-line for all Kentucky families.<sup>186</sup> Other statistics reinforce this grim picture.

Blacks constituted only 5.6% of Kentucky families living above the federal poverty level. On the other hand, African Americans constituted 12.8% of the state's families living below the poverty threshold. The following numbers reinforce the

---

<sup>183</sup> Ibid., pp. 645-646.

<sup>184</sup> United States Census of Population and Housing, 1980 B Summary Tape File 3A (Kentucky), p. 1. (as provided by the State Data Center, University of Louisville).

<sup>185</sup> Kentucky State Data Center, "1980 Equal Employment Opportunity Report;" Census, 1980 (Kentucky), p. 6.

prevailing image. The ratio of White-to-Black families receiving an income of less than \$5000 was 7.5:1 That means that for every Black family earning less than \$5,000, there were seven and one-half White families at the same income level. Another way of understanding it is that Blacks made up 13.33% of families earning less than \$5,000 per year, a high figure given that Blacks comprised 7.1% of the total population. Interestingly, as income levels rose, so did the disparity between Whites and Blacks. Of families earning incomes between \$10- and 14,999, the ratio was 15.4:1 while the margin shifted to 22.2:1 for families earning between \$20- and 24,999. Finally, for families gaining income between \$35- and 49,999, the ratio of Blacks to Whites rose to 27.4:1 In other words, Blacks made up only 3.6% of families at this moderately high level of income.<sup>187</sup>

Although the preceding data fail to show the amount of wealth in the Black community, they imply a great deal. If Blacks in Kentucky earn significantly less money than Whites, then Blacks also own fewer assets and investments than Whites. The statistics on home ownership support this hypothesis. The Census data regarding “specified owner-occupied non-condominium housing units by race” revealed that approximately 8.6% of homeowners with a mortgage of less than \$200 per month were African American. In contrast, Blacks made up only 4.9% of homeowners with mortgages between \$3- and 400 per month and 3.1% of homeowners with mortgages \$500 per month or higher.<sup>188</sup> Although these figures tell us little about the value of the homes captured in the survey, they imply discrimination in lending patterns and suggest how little equity Blacks can access as start-up funds for a business.

The 1990 equal employment update indicates continued occupational segregation, featuring modest changes over the course of a decade. Although Blacks made slight gains in the categories of “executive, administrative, managerial” and “protective services” positions, they lost ground in the “professional specialty” and “precision

---

<sup>186</sup> . Census, 1980 (Kentucky), p. 7.

<sup>187</sup> . Census, 1980 (Kentucky), p. 7-8.

production, craft, and repair” classifications. Though Blacks comprised 31% of private household cleaners and servants, they made up just 2.1% of financial managers and seven-tenths of 1% of all wholesale and retail buyers. Even as Blacks constituted 4% of registered nurses, they were 1.5% of the state’s dentists, 0.95% of the state’s architects, and 0.8% of its attorneys.<sup>189</sup>

Based upon national averages, Kentucky Blacks have significantly fewer resources with which to create and maintain start-up businesses. Without wealth, Blacks also lack the ability to influence the public and private institutions that influence the economic fortunes of the state. In their study of the disparities between Black and White wealth, professors Melvin Oliver and Thomas Shapiro found overwhelming differences between the two groups, even between individuals and families of both races who earned similar incomes, had similar educational and employment backgrounds, and similar socioeconomic status. Using regression analysis and other sophisticated statistical tools, Oliver and Shapiro revealed that at every socioeconomic level, Whites possess more wealth than their Black counterparts and that these differences cannot be explained by stereotypical assumptions about Black competence, competitive drive, or lack of skills.

We estimated in the regression equations that if [W]hites and [B]lacks were completely equal with regard to a range of human capital, sociological, and demographic factors, then about 29 percent of the existing wealth (net worth) inequality would be explained. Remarkably, however, more than 70 percent would still remain unaccounted for.<sup>190</sup>

Oliver and Shapiro have established that middle- and upper-middle class Blacks cannot transfer their status to their children as White parents can and that Blacks, despite working desperately, cannot escape the economic detours of racism. They conclude that generations of discrimination and exclusion, coupled with contemporary institutional racism place African Americans in a situation in which simply toiling to the same extent as Whites produces a substantially inferior reward. If [W]hite and [B]lack households

---

<sup>188</sup> Census, 1980 (Kentucky), p. 11.

<sup>189</sup> Kentucky State Data Center, “1990 Equal Employment Opportunity Report.”

shared all the wealth-associated characteristics we examined, [B]lacks would still confront a \$43,000 net worth handicap!”<sup>191</sup>

Stereotypes about Blacks fail to explain the inability of Black-owned businesses to grow, thrive, and enter into contracts with the State of Kentucky. When confronted by demands for more Black teachers, Kentucky school systems claim that they cannot find qualified applicants. Yet, this same system fired Black teachers and principals in droves to prevent them from teaching in all-White or integrated schools. When confronted by protests to hire or work with Black professionals, Kentucky businesses respond that Blacks lack the skills and or education to compete in today’s business world. Yet, it was these same White elites who deprived Blacks of the chance to hone skills, learn new ones, or gain a valuable education. Suffice it to say that the evidence regarding the disparities in public contracting lies in a path over two centuries long.

The slowing U.S. economy bodes ill for Black business development nationwide. Indeed, the gap between rich and poor in Kentucky continues to grow.<sup>192</sup> As it does, Black families and entrepreneurs will face great challenges if they are to maintain the small niche they have created in the state.

Oliver and Shapiro established not only growing contemporary income inequalities between Blacks and Whites, but staggering wealth differences as well. For example, Blacks in “upper-white-collar” occupations earned \$30,075 compared to \$39,994 for their White peers. Upper-white-collar Black households had a net worth of \$12,303. Shockingly, their White counterparts commanded \$66,800 in net worth. To round out the picture, self-employed Blacks had a net worth of \$17,962, impressive in contrast

---

<sup>190</sup> . Oliver and Shapiro, Black Wealth/White Wealth, p. 169.

<sup>191</sup> . Ibid., p. 174.

<sup>192</sup> . Nancy Zuckerbrod, “Gap Between Rich, Poor Grows in State,” *Louisville Courier-Journal*, January 18, 2000, on-line version; Tom Loftus, “Study: More Working Families in Poverty,” *Louisville Courier-Journal*, April 7, 1999, on-line version.

to most Black families but insignificant when compared to \$100,134 in net worth for self-employed Whites!<sup>193</sup>

With Black families and business owners existing in such an asset-deficient condition, the future of African American business development is in dire straits. With Black incomes in Kentucky as low as they are, Black-owned enterprises face a daunting challenge just to survive. Little wonder that Black-owned businesses are reluctant to bid on state contracts: why expend precious time, energy, and resources to gain a contract when history establishes that rejection is a virtual certainty?

The precarious position of Kentucky's Black owned-businesses in 2001 has its genesis in phenomena roughly 250 years old. Although African Americans have made strides toward equality, much work remains. It should come as no revelation that the sentiments of contemporary Blacks can be summed up in words written thirty-five years ago by Frank Stanley:

Frankly, the average Caucasian Kentuckian is mostly unaware of the important goals yet to be achieved, or more specifically, of the amount of non-progress that has been made. Certainly most are totally incapable of realizing the tortures of hellish racial prejudice and what it does to the souls and minds of people who are forced to suffer it.<sup>194</sup>

White violence, intimidation, and general hostility have proven to be effective disincentives for Black entrepreneurship in Kentucky. No other group of people would be willing to put in as much effort as African Americans have for such a bitter reward. Given the history of the Commonwealth, one can understand both the relatively small number of Black-owned businesses in the state and their reluctance to bid on state contracts.

---

<sup>193</sup> . Oliver and Shapiro, Black Wealth/White Wealth, pp. 118-119.

<sup>194</sup> . Wright, A History of Blacks in Kentucky, vol. 2, p. 226.

## **IV. ANALYSIS OF PURCHASING POLICIES, PRACTICES & PROCEDURES**

The purpose of this section is to analyze the purchasing policies, practices and procedures of the Commonwealth of Kentucky (“the Commonwealth”). This analysis is conducted with a view toward examining the practical application of these policies and procedures in order to discern their real and perceived impact on the Commonwealth’s utilization of minority and women-owned businesses. In preparing this analysis, relevant written laws, policies and procedures were reviewed by legal and purchasing experts. The information derived from these reviews was supplemented with interviews of over 25 Commonwealth officials, employees, vendors, and contractors regarding their experiences with, and observations of, the application and impact of the Commonwealth’s laws, policies and procedures on purchasing and contracting with minority and woman-owned businesses. This analysis is not intended to detail every aspect of purchasing and contracting within the Commonwealth; instead, it highlights those aspects deemed relevant for purposes of this study.

### **➤ Kentucky Model Procurement Code**

The Kentucky Model Procurement Code (“the Code”) designates the Finance and Administration Cabinet as the central procurement and contracting agency of the Commonwealth.<sup>195</sup> The Code further grants the Finance and Administration Cabinet power and authority over the purchasing, management, and control of supplies, services, and construction, as well as any other items required to be purchased by the Commonwealth. The Finance and Administration Cabinet has also been granted the power to adopt the necessary regulations in order to carry out its responsibilities under the Code, with some exceptions. Included are procedures for delegating purchasing

---

<sup>195</sup> Kentucky Revised Statute (KRS) § 45A..

authority, small purchase procedures, guidance regarding source selection, and related purchasing disciplines.

During the period in which this disparity study was conducted, the Kentucky Model Procurement Code included provisions for Kentucky to set aside certain state contracts of goods, equipment, construction or services where there was a reasonable expectation that bids could be obtained from at least three small or small minority businesses capable of furnishing the desired goods or services at a fair and reasonable price.<sup>196</sup> While these provisions were enacted in 1990, Griffin & Strong, P. C. found no indications that the set-aside provisions have ever been relied on or otherwise enforced. One manager in the Finance & Administration chain of command indicated that his cabinet has shied away from set-asides as a result of admonitions from cabinet attorneys regarding lawsuits at the federal and/or state level.<sup>197</sup>

Lawsuits notwithstanding, a press release from the Kentucky Auditor of Public Accounts, dated June 15, 2000, cited criticism of the Finance and Administration Cabinet in the 1999 Statewide Single Audit of Kentucky ("SSWAK") for neglecting statutorily required set-asides for small and small minority businesses, as well as failure to enforce equal employment opportunity ("EEO") laws.<sup>198</sup> In its Schedule of Findings and Questioned Costs, the SSWAK, which is the annual compliance audit of state agencies that receive federal funds, raised numerous questions regarding the Finance and Administration Cabinet's efforts to verify contractors' compliance with EEO laws and questioned why the Cabinet has not implemented the small and small minority business set-aside laws.<sup>199</sup> The audit, having specifically noted that KRS § 45A.675 was enacted after the 1989 Croson decision, and then modified in July 1998, questioned the efficacy

---

<sup>196</sup> KRS § 45A.665 to 685.

<sup>197</sup> PPI No. 2.

<sup>198</sup> Press Release from Kentucky Auditor of Public Accounts: "EEO Compliance Weak, Small and Minority Business Set Asides Ignored by State Government", June 15, 2000.

<sup>199</sup> Commonwealth of Kentucky Schedule of Findings and Questioned Costs for the Year Ended June 30, 1999, Finding 99-FAC-13, page 168.

of the Finance and Administration Cabinet's reliance on limits imposed by Croson in not implementing the statute.

➤ Regulations

The Code grants all state agencies \$1,000.00 small purchase authority and authority for up to \$10,000.00 per project for construction.<sup>200</sup> The Finance and Administration Cabinet is granted authority up to \$20,000.00 per project for construction or purchases, as are the state colleges and universities, and the legislative branch of state government. The secretary of the Finance and Administration Cabinet is also authorized to grant state agencies a delegation of small purchasing authority that exceeds the agency's small purchase limit, provided the agency demonstrates a justifiable need. The Finance and Administration Cabinet's regulations allow for delegation based on the size of the agency, the dollar amount of annual purchases, staff experience, and other factors.<sup>201</sup>

➤ Policies and Procedures

The Finance and Administration Cabinet's Policies and Procedures Manual provides guidance in administering the laws and regulations specific to purchasing and contracting. This manual provides specific references to relevant statutes and regulations and provides instructions for carrying out such processes as competitive sealed bid advertising, award of construction contracts, requests for proposals, and related contracting functions. Most agency representatives interviewed for this disparity study stated that they tend to follow the guidelines laid down in the Finance and Administration Cabinet's Policies and Procedures Manual, whether by adopting them as the agencies' procedures, following the procedures outright, or establishing equivalent procedures.<sup>202</sup> Since small purchases do not yet appear to have been audited by the Finance and

---

<sup>200</sup> KRS 45A-100.

<sup>201</sup> 200 KAR 5; PPI No. 3.

<sup>202</sup> PPI Nos. 5, 9 15, 17, 18, 20.



Administration Cabinet, there appears to be no practical way to establish the adequacy of these procedures or their application by the various cabinets.<sup>203</sup>

➤ Types of Purchases and Contracts

As might be expected, the Commonwealth purchases a variety of goods and services that tend to involve almost every available industry. These include, but are not limited to: office equipment and supplies, food services, medical and laboratory supplies, professional services, transportation-related services, law enforcement-related products and services, information technology, and many others.

The Finance and Administration Cabinet issues purchase orders and price contracts in response to purchase requisitions.<sup>204</sup> Purchase orders commit the Commonwealth to purchase a specific quantity of an item for a specific price. Price contracts, on the other hand, are used to establish price agreements with vendors for specific items at specific prices for a period of time, typically a year. Some price contracts are designated as “all state agency” and, once in place, must be used by all state agencies for procurement of covered items in excess of \$500.00 or such other dollar amount as may be established.<sup>205</sup>

As an example of the magnitude of the Commonwealth’s purchasing activities, a snapshot of procurement statistics for Fiscal Year 1999, prepared by the Finance and Administration Cabinet, showed annual procurement expenditures of \$584 million, purchases from existing agreements of \$190 million, one-time purchases of \$200 million, and Procard purchases through the third quarter of \$22 million.<sup>206</sup> The same snapshot also showed the number of current or existing vendor agreements at 2,818, with 12,012 one-

---

<sup>203</sup> PPI Nos. 3, 20.

<sup>204</sup> Division of Purchases Policies and Procedures BO-111-37-00.

<sup>205</sup> Division of Purchases Policies and Procedures BO-111-37-00, PPI No. 4

<sup>206</sup> Finance and Administration Cabinet presentation, “Doing Business with the Commonwealth of Kentucky”; PPI No. 3. The “Procard” is the Commonwealth’s equivalent of a credit card, which is issued to certain employees for some small purchases.

time purchases issued, and ten current consolidated contracts for such commodities as office supplies.<sup>207</sup>

➤ Methods of Purchasing and Contracting

The Commonwealth engages in purchasing and contracting using methods most appropriate to the circumstances for the items or services being acquired, which methods do not appear atypical for public contracting. These methods include small purchase contracts entered into pursuant to delegation from the Finance and Administration Cabinet, competitive sealed bid awards, competitive negotiated contracts, and noncompetitive negotiated contracts. Questions of solicitation procedure, responsiveness or responsibility of bidders, cost or pricing data requirements and the like are guided by statute.<sup>208</sup> With the exception of restrictions placed on certain cost-type contracts, purchasing agencies are free to utilize any type of contract that will promote the best interests of the Commonwealth.<sup>209</sup>

➤ Procurement Responsibility

As previously noted, the Commonwealth's procurement and contracting responsibilities are divided so that they place primary procurement responsibility within the Finance and Administration Cabinet, with delegations as provided by law and discretion with regard to smaller purchases. Purchasing responsibility for all goods and services, except construction, is vested in the Finance and Administration Cabinet's Division of Material and Procurement Services. Capital construction is assigned to the Division of Contracts and Administration within Finance and Administration's Department for Facilities Management. The Department for Facilities Management generally handles all major construction contracting with the exception of the construction contracting handled by the Transportation Cabinet in connection with the Commonwealth's roads, and with the further exception of some of the universities.

---

<sup>207</sup> Finance and Administration Cabinet presentation, "Doing Business with the Commonwealth of Kentucky"; PPI No. 3

<sup>208</sup> KRS 45A.105, et seq.

Interviews with officials representing cabinets in the executive branch of the Commonwealth confirmed their reliance on the Finance and Administration Cabinet for construction-related activities and purchases in excess of the various small purchase limits.<sup>210</sup>

The Transportation Cabinet, which has the largest purchasing authority delegation outside of the Finance and Administration Cabinet, is responsible for procuring all materials and services necessary to build and maintain roads. The remaining cabinets and agencies of the Commonwealth are vested with varying levels of authority to purchase goods and services and engage in construction contracting in accordance with the small purchase authorities granted by statute and delegation from the Finance and Administration Cabinet. The Transportation Cabinet, because it receives federal funds, also has a federal mandate to engage in other activities not necessarily required by State law, such as disadvantaged business enterprise (“DBE”) utilization requirements and related outreach and reporting requirements. The purchasing practices of the various cabinets, that are deemed relevant to this study, are discussed below.

➤ **Finance and Administration Cabinet**

Within the Finance and Administration Cabinet, there are several functional divisions and departments. For purposes of this study, however, segments of the Department for Administration and the Department for Facilities Management, as well as the Office of Equal Employment Opportunity and Contract Compliance, were examined for their roles in the purchasing and contracting process.

**Division of Material and Procurement Services**

Within the Department for Administration, the Division of Materials and Procurement Services (“DMPS”) procures items that exceed the small purchase

---

<sup>209</sup> KRS 45A.135

<sup>210</sup> Purchasing Practice Interview (“PPI”) Nos. 13, 14, 15, 23.

delegation for the various departments and agencies with small purchase dollar limits. This includes most goods and services, but does not include construction. While making no reference to a statutory or regulatory requirement to do so, according to officials, DMPS has adopted an unwritten policy that any minority-owned Kentucky business that is "registered" with the Commonwealth is to be solicited to bid on items that such businesses supply.<sup>211</sup> Officials state that this unofficial policy came about as a result of a roundtable meeting with minority contractors and vendors in the early 1990s.<sup>212</sup> No information was provided as to whether enforcement of this policy is tracked, how the success or failure of the policy is gauged, or precisely how the policy flows throughout the purchasing organization.

### **Division of Contracting Administration**

Within the Department for Facilities Management, the Division for Contracting and Administration ("DCA") has primary responsibility for capital construction for the Commonwealth.<sup>213</sup> Generally, all construction projects in excess of \$20,000.00 must go through the DCA.<sup>214</sup> Other responsibilities of the Department for Facilities Management ("DFM") are buying, selling, and leasing real property for state agencies, oversight of historical properties, and maintenance of state-owned buildings for state agencies. Capital construction projects are administered by the DCA in concert with the Division of Engineering, which is also a part of the DFM.

The DFM has been the target of criticism by community activists in recent years as a result of perceived underutilization of minority contractors on such projects as the Kentucky Historical Center.<sup>215</sup> This criticism encompasses all phases of such projects, from design to subcontracting. According to high-level DFM managers, design consultants are selected on a professional skills basis, as opposed to a low bid system.

---

<sup>211</sup> PPI No. 4

<sup>212</sup> PPI No. 4

<sup>213</sup> Exceptions include, but are not limited to, the major universities and some state government corporations.

<sup>214</sup> KRS 45A, Kentucky Model Procurement Code.

<sup>215</sup> PPI Nos. 2, 24, 25

Such selections, according to these managers, are purely qualifications-based, and are conducted and managed by non-appointed, merit employees so as not to be subject to political influence. Typically, architects team up with other professionals to form a team that pursues projects according to the Commonwealth's specifications. The Commonwealth then selects the overall team for each project, although it does not get involved with selecting the members that comprise the teams. According to DFM's management, the Commonwealth does not require that the architect and engineering ("A&E") firms disclose either the members of their team or the fee arrangements between the members. Customarily, a fee is negotiated with the lead architect based on a percentage of construction costs and changes are only made when or if there is a change in the scope of services. Likewise, according to the same DFM managers, the Commonwealth refrains from involvement with subcontractors as well. This hands-off approach also extends to the fees paid to the subcontractors. According to one of the managers, "We don't know and we don't ask; we perceive it to be none of our business."<sup>216</sup>

As for the actual construction phase of projects, the officials interviewed for this study estimated that ninety percent of DCA's work is to bid the prime contract through a phased "design-bid-build" process. An appropriate professional is hired to do the design work, then the Commonwealth requests lump sum bids from general contractors, including information as to the identity of the subcontractors, unit prices, materials and equipment. At this point, the Commonwealth either approves or disapproves of the bids based largely on past history with the contractor, qualifications, and similar criteria. In order to keep contractors from "shopping" the bids of their proposed subcontractors, it is said that the contractors are prohibited from changing subcontractors after contract approval.<sup>217</sup>

With regard to the status of construction subcontractors as minority or disadvantaged business enterprises ("MBEs" or "DBEs"), DCA's records will usually not

---

<sup>216</sup> PPI No. 2

<sup>217</sup> PPI No. 2

show this information, nor will they show how much each subcontractor is ultimately paid. One of the officials interviewed stated that, until about two years ago, there was no mandate, procedure, or policy to involve MBE's or DBEs in construction, although he said he believed KRS §45A contained a provision permitting set asides of procurements to MBEs or DBEs. This manager also said that the DCA did not make an effort to keep records of MBE/DBE utilization until a couple of years ago, and that, while DCA tried to do set-asides for MBEs/DBEs a few years ago they were not successful because of the Commonwealth's lack of knowledge of the minority business community.<sup>218</sup> One of the managers also said that the Finance and Administration Cabinet was advised by one of its attorneys of the existence of lawsuits involving MBE utilization, and that this advice caused the Cabinet to move away from any consideration of set-asides. According to another of the high level DCA managers interviewed, until recently, no particular emphasis was placed on involving MBEs, and if an MBE won a contract, it was generally a coincidence.<sup>219</sup>

With regard to A&E projects, DCA managers stated that, to the best of their knowledge, the architecture and engineering trade associations and professional organizations do not maintain information on MBE members of their organizations; hence, the Commonwealth has been limited in its ability to target outreach efforts to MBEs. One manager recalled the \$60 million Commonwealth Convention Center Project in Louisville approximately two years earlier. For this project, the Commonwealth worked with minority business community activists and advocates to establish a 15% project goal, which the managers said they were able to meet. In that instance, general contractors were asked to identify MBE subcontractors and to estimate the amount the subcontractors would be awarded. General contractors were "encouraged" to include MBEs, but not required to do so, despite DCA management's belief that the Commonwealth could legally make the requirement on the basis of a "value-rated, weighted average bid system."<sup>220</sup> According to this official, such a system has not been

---

<sup>218</sup> PPI No. 2

<sup>219</sup> PPI No. 2

<sup>220</sup> PPI No. 2

implemented because the Commonwealth does not know what an appropriate goal should be for this purpose.

According to DCA officials, after the Convention Center project, the Commonwealth did not set goals for a while, but tried to devise a form that would allow them to collect information voluntarily from bidding contractors as to the composition of their teams. The form was merely an attempt to capture data, but did not involve the setting of goals.<sup>221</sup>

The DCA officials also discussed their division's experience with the Natural Science Center at Northern Kentucky University. For this project, a goal of ten percent was set, but the actual goal achieved was 15%. This was a "voluntary" effort involving the use of the newly devised data collection forms, and information was provided to the contractors to assist them in reaching out to locate MBEs. Contractors were also reminded of the Commonwealth's broad powers to audit contracts to assure the authenticity of contractors' representations.<sup>222</sup>

In discussing the apparent shortage of MBE architects and engineers, DCA managers said that they do not actively recruit architects and engineers from outside the state, although they end up getting them from all over the country. Officials expressed their experience and belief that construction contractors and subcontractors will generally only travel so far to work due to concerns over costs; thus they believe the Commonwealth is limited with respect to the geographic distances it can expect firms to travel in pursuit of work. The managers spoke of several anticipated projects in areas around the state, including the area known as the "Golden Triangle", on which they plan to track utilization of MBEs.<sup>223</sup> For these projects, MBE utilization goals will be set although over half of the projects will be performed in rural areas outside the Golden Triangle, and beyond what is believed to be the reasonable driving distance for most

---

<sup>221</sup> PPI Nos. 2, 25.

<sup>222</sup> PPI No. 2.

firms seeking work. This comes about partially as a result of the Commonwealth's initiatives to develop rural Kentucky where there was little or no work, tourism, or other signs of economic vitality.

The DCA officials interviewed concurred in the belief that two factors will help stimulate MBE utilization in the near future. The first, they believe, is the generalized effort to register and qualify MBEs through the newly created Governor's Office of Minority Affairs. The other influential factor will be the licensing of contractors by state government, since such licensing is only currently done for HVAC contractors and, in some localities, electrical contractors.

The DCA officials said it is their belief that 99% of all contractors they utilize come from the Commonwealth. Likewise, nearly all of the A&E firms utilized are Kentucky-based, with the exception of certain highly specialized disciplines. These managers stated that it is their goal to keep the millions of dollars spent by the DCA in Kentucky by using Kentucky firms, even if it requires that they break up projects and structure them in favor of Kentucky contractors. They acknowledge that no state law or policy requires this effort, but they believe that by focusing on placing the business with Kentucky firms, they are being responsive to the inquiries and concerns voiced by both legislators and contractors in the Commonwealth.<sup>224</sup> One official acknowledged that he has been approached by African American firms from both Tennessee and Georgia that have indicated a desire to do business with the Commonwealth, but that these firms have not pursued the matter. Other officials expressed concern that the availability pool of contractors includes those from neighboring states and, therefore, exclusion of contractors because they are not from Kentucky may not be prudent or practical.<sup>225</sup>

DCA officials indicated their belief that MBEs generally do not pursue A&E contracts, primarily because of the cost of proposing and staging presentations, which can

---

<sup>223</sup> The "Golden Triangle" refers to the area between Louisville, Lexington, and Northern Kentucky in which there has historically been strong economic activity, and in which the vast majority of the African American population resides.

<sup>224</sup> PPI No. 2

<sup>225</sup> PPI No. 1.



run from \$2,000 to \$3,000.<sup>226</sup> When weighed in conjunction with the knowledge that less than a handful of MBE firms have been selected through the current process, they believe the cost may seem prohibitive to many. On the other hand, other officials have expressed their belief, based on experience, that minority business owners may be skeptical about how serious the Commonwealth is about doing business with them.<sup>227</sup>

"Price contracts" are given to every firm that wants one, according to DCA's managers.<sup>228</sup> The price contracts to which they refer are generally under \$40,000.00 each, and are awarded on a discretionary basis. Nevertheless, while hundreds of such projects are awarded on a discretionary basis, each firm is limited to a maximum of about \$100,000 per year through this process.<sup>229</sup> Price contracts have been awarded to MBE firms, despite the fact that at least one firm has refused to do price contract work because the firm's principal reportedly felt it was "beneath" them.<sup>230</sup> Another firm is said by the managers to have declined price contract business because it was well below what the firm could normally earn on other contracts. In at least one interview conducted for this study with the principal of a minority-owned A&E firm, that business owner expressed his view that the Commonwealth was not serious about doing meaningful business with MBE firms because they routinely proffer these smaller dollar contracts to MBE firms with multi-million dollar portfolios and performance track records that show that they are capable of working much more complex jobs.<sup>231</sup> This view was not altogether unfamiliar to Commonwealth officials, as one official noted that he believes African American A&E firms perceive the Commonwealth will not do business with them under any conditions. He also said he has been told that African American firms' owners believe the Commonwealth is not serious about doing business with them, and they are correct.<sup>232</sup> According to this manager, the selection process was discretionary up until about five or

---

<sup>226</sup> PPI No. 2.

<sup>227</sup> PPI No. 2,16

<sup>228</sup> PPI No. 2.

<sup>229</sup> PPI No. 2.

<sup>230</sup> PPI No. 2.

<sup>231</sup> Anecdotal Interview No. 7

<sup>232</sup> PPI No. 2.

six years ago and even some non-minority firms felt excluded by the system, although he believes the system is fairer now than it was.

Commonwealth officials cited other barriers to construction contracting with minorities, including bonding capacity of MBEs, which has in the past been insufficient. In order to do business with MBEs without sufficient bonding capacity, the Commonwealth has had to go through the general contractors in order to ensure bonding requirements could be met.

### **Office of Contract Compliance and Equal Employment Opportunity**

In addition to investigating claims of discrimination and harassment, the Office of Contract Compliance and Equal Employment Opportunity (“OCC”) works with the Division of Materials and Purchasing to ensure compliance by contractors with regard to minority hiring. The Office of Contract Compliance has also, within the last two years, taken a more active role with regard to minority business utilization, including but not limited to, helping establish disadvantaged business enterprise utilization goals, enhancing outreach efforts, and tracking utilization numbers. The Office of Contract Compliance does not certify businesses as minority, woman-owned, or disadvantaged, but will accept such certifications from recognized entities like the Kentucky Department of Transportation and the Minority Supplier Development Council.<sup>233</sup> Likewise, the office does not appear to have enforcement responsibilities with regard to discoveries of noncompliance.

With three employees, including clerical, OCC staff size is relatively small when considering the magnitude of covered contracts let by the Commonwealth, the need for outreach, compliance, goal-setting, and other responsibilities. Also, organizationally speaking, the OCC is buried within the Finance and Administration hierarchy, which raises questions regarding the priority placed by the Commonwealth on its compliance

---

<sup>233</sup> PPI No. 25

responsibilities and its empowerment of the OCC to effectively raise noncompliance issues to a level where they can be properly addressed.

There is a perception among some officials within the Commonwealth that very little is done to verify disadvantaged business enterprise participation on projects.<sup>234</sup> These officials also believe that the Commonwealth does not maintain sufficient staff to certify minority-owned, woman-owned, or disadvantaged businesses, or to engage in recruitment and outreach efforts, much less to verify participation on active projects.<sup>235</sup> The concern in this regard is that the State's failure to adequately fund the positions necessary to perform these tasks is further indication of the lack of priority the state gives to the matter. As previously noted, concerns were also raised by the state's Auditor of Public Accounts in the 1999 Statewide Single Audit of Kentucky that equal employment opportunity laws were not being properly enforced by the Finance and Administration Cabinet through the Office of Contract Compliance and EEO.<sup>236</sup>

➤ Transportation Cabinet

As previously noted, the Transportation Cabinet has the largest delegation of purchasing authority of the Commonwealth agencies and cabinets, after the Finance and Administration Cabinet. With regard to minority and woman-owned business utilization, this cabinet must be viewed as having activities through two major components: the Division of Purchases and the Disadvantaged Business Enterprise ("DBE") Program. The Division of Purchases is responsible for purchasing all commodities and services that are unique to the Transportation Cabinet and enable it to maintain the roads, such as ice and snow chemicals and the like. To accomplish this, the Finance and Administration Cabinet delegates to the Transportation Cabinet the authority to purchase the needed items and the Transportation Division of Purchases proceeds with its purchasing and contracting using procedures their officials say mirror those of the Finance and

---

<sup>234</sup> PPI Nos. 7, 16.

<sup>235</sup> PPI Nos. 7, 16.

Administration Cabinet.<sup>237</sup> On the other hand, the DBE Program is operated as part of a federal requirement for disadvantaged business utilization in the building of state roads with federal funds. As such, the requirements for DBE utilization are imposed by the federal government and do not come about as a result of state statutes, regulations, or policies.

➤ Division of Purchases

According to a high level official within the Division of Purchases, the Finance and Administration Cabinet has historically shouldered the responsibility for affording business opportunities in state government to small, disadvantaged or minority or woman-owned businesses.<sup>238</sup> Therefore, according to this official, little effort has been made to determine in advance of soliciting for goods and services, whether potential respondents are minority or woman-owned businesses; nor has much effort been put into identifying minority or woman-owned businesses as targets for solicitation, or to ensuring their inclusion among those firms solicited. As a consequence, there have been few, if any, minority businesses supplying goods and services to the Division of Purchases, and the particular official referenced herein was unaware of any efforts within the organization to track such awards.

➤ Disadvantaged Business Enterprise Program

The DBE Program for the Kentucky Transportation Cabinet appears to have achieved a level of success that has occurred in spite of the Commonwealth's efforts, as opposed to resulting directly from efforts put forth by the Commonwealth. As previously noted, this program is federally mandated and, from all indications, but for that mandate, neither the program nor DBE utilization would exist.

---

<sup>236</sup> Press Release from Kentucky Auditor of Public Accounts: "EEO Compliance Weak, Small and Minority Business Set Asides Ignored by State Government", June 15, 2000; Commonwealth of Kentucky Schedule of Findings and Questioned Costs for the Year Ended June 30, 1999, Finding 99-FAC-11.

<sup>237</sup> PPI No. 11

<sup>238</sup> PPI No. 11

Despite its successes, the federal DBE program has its problems, according to some in state government. The root of the problem seems to be that “DBE”, as defined by the federal government, includes businesses owned by a variety of ethnic and racial minorities, as well as women. As a consequence, it is important to note that the intermingling of groups within a single heading does not necessarily mean that all groups have been consistently utilized. In fact, a point consistently brought out by some Commonwealth officials and minority business owners alike is that inequities are posed by the utilization of female owned businesses to meet DBE goals, which they say has occurred to the exclusion of many ethnic and racial minorities.<sup>239</sup> While conceding that they must accept a definition that includes women as disadvantaged for federal contracting purposes, these officials view the Commonwealth’s inclusion of women with racial and ethnic minorities as “minority” or “disadvantaged” to be overreaching and unnecessary.<sup>240</sup>

According to one official, the minority-owned businesses involved with the state’s highway program were better off overall until the point when women-owned businesses began to be included as disadvantaged business enterprises.<sup>241</sup> Until then, this official said, he saw an active minority highway group become alive and more visible; however, once the women-owned businesses came into the category, they were used more often by contractors because the contractors began creating their own DBE firms, using their wives, daughters, and other relations as the principals.<sup>242</sup> As for the racial and ethnic minorities, aside from the general skepticism with which many of them view the state’s minority business utilization efforts, some officials who work closely with minority businesses say that efforts to encourage their participation in the federally-based DBE program often fail due to the perception that the program is for white females.<sup>243</sup>

➤ Agencies and Cabinets

---

<sup>239</sup> PPI Nos. 1, 21, 16, 25

<sup>240</sup> PPI Nos. 1, 16, 21.

<sup>241</sup> PPI No. 21.

<sup>242</sup> PPI No. 21

<sup>243</sup> PPI No. 16.

Outside of the Finance and Administration and Transportation Cabinets, most other agencies appear to confine their individual purchasing to the limits of their small purchase delegation. They also appear to have quite a bit of autonomy and very little oversight with regard to placement of their purchases.<sup>244</sup> This includes purchases using the Commonwealth's "Procard", which operates like a credit card. Source selection for many discretionary purchases such as state police vehicle repairs or gasoline purchases, for example, are often left to individual officers.<sup>245</sup> Individual cabinets primarily establish their own internal controls, which are subject to audit only after-the-fact, if at all.<sup>246</sup>

With the exception of those whose jobs or areas of interest expose them to the concerns of minority and female businesses seeking to do business with the Commonwealth, cabinet personnel interviewed for this study seemed largely indifferent on the subject of minority and female business utilization. Few gave any indication that they were knowledgeable or versed on the subject, or that they had even been exposed to any initiatives on the part of state government to increase the utilization of minority and female businesses. Likewise, there were no indications that executive branch or cabinet level commitments to minority business outreach and utilization had filtered through or compelled most of them to do other than business as usual with regard to their purchasing and contracting activities.

In those few quarters where the subject of minority and female business utilization had been considered, observations that some felt could have an impact on the question included the following:

a. Good Old Boy Network

Some Commonwealth officials expressed their belief in what is commonly referred to as the "good old boy" system of doing business. Under this system, business

---

<sup>244</sup> PPI No. 3,11,14,20, 25.

<sup>245</sup> PPI No. 13.

change within their various agencies without more direct pressure to do so.<sup>249</sup> Another official proffered the explanation that people are comfortable doing business with people they know” as a possible explanation for the difficulties vendors new to doing business with the Commonwealth face.<sup>250</sup>

b. Commonwealth’s Passivity with Respect to Previously Identified Barriers to Minority Businesses

Some officials expressed frustration with the Commonwealth’s lack of action regarding previously identified barriers to minority-owned businesses. At least three officials referred specifically to previous investigations into minority business utilization, such as the Subcommittee on General Government’s report on HCR 109 in November 1989.<sup>251</sup> This report came about as a result of the Kentucky General Assembly’s passage of HCR 109, which directed “the Interim Joint Committee on State Government to study state procurement policies as they relate to minority-owned businesses.”<sup>252</sup> After referring the matter to the Subcommittee on General Government, public hearings were held to assess the status of the Commonwealth’s purchasing and contracting with minority-owned businesses. In addition, historical data were reviewed in order to assess the dollars awarded to minority-owned businesses during the preceding fiscal years. The Subcommittee found extremely low utilization of minority businesses in terms of dollars awarded (well below two percent for fiscal years 1985 through 1989). The Subcommittee also found that many of the small minority businesses faced problems other small businesses face, such as inability to obtain bonding and financing, and problems with slow payments from prime contractors. The Subcommittee also noted, however, the consensus among minority persons who appeared at the public hearings, that they were

---

<sup>249</sup> Id.

<sup>250</sup> PPI No. 25.

<sup>251</sup> Interim Joint Committee on State Government, Subcommittee on General Government, HCR 109: Final Report, November 1989; PPI Nos. 1, 7, and 25.

<sup>252</sup> Interim Joint Committee on State Government, Subcommittee on General Government, HCR 109: Final Report, November 1989; PPI Nos. 1, 7, and 25.

is typically conducted with those vendors with which the purchasing agents have previously done business or with which they have other relationships or affiliations. As a result of placing such heavy emphasis on the prior business dealings, newer vendors, many of which may be minority or woman-owned, are faced with a standard with which they cannot compete, and are effectively excluded from consideration.

One official referred to a “conspiracy of discretion” that has contributed to the perpetuation of the old boy network.<sup>247</sup> As described by this official, the conspiracy of discretion mainly involves commissioners, directors, branch managers, and others who look the other way and allow the exclusion of minorities in contracting and hiring within the Commonwealth. This official, whose job requires interaction with all of the cabinets and agencies, cited the Transportation Cabinet as one of the areas in which the good old boy network has been allowed to thrive, particularly with regard to treatment of their minority employees. He also cited his opinion, based on personal observation that “a lot of discrimination” comes from white females at the middle management levels. This official expressed a generalized concern that in various places throughout the Commonwealth, such as Lexington, the races are virtually segregated; and that in institutions such as the state hospitals, there are large numbers of minority workers, but few can be found at higher levels of management.

Another official expressed his belief that the procedures followed by most of the cabinets and agencies are tied to the old boy system.<sup>248</sup> This official, who began his career with the state in the early 1970s, said that his personal efforts to document minority business utilization yielded about \$10,000.00 at that time, and while there have been increases, he is not aware of the state doing much better than one and one-half percent of total procurement dollars with minority-owned businesses. This same official also expressed concern that the cabinet secretaries are not serious about fulfilling the present governor’s commitments to minority business utilization and will not move to implement

---

<sup>246</sup> PPI No. 20.

<sup>247</sup> PPI No. 10

<sup>248</sup> PPI No. 1



discouraged by their past attempts to do business with the Commonwealth and questioned why they should continue trying.

The officials who made reference to the above Subcommittee Report also mentioned other unsuccessful efforts to commission disparity or “predicate” studies.<sup>253</sup> These earlier efforts seem to have heightened frustration among interested government officials and members of the minority business community alike, and deepened the perception that little was being done to remove barriers to doing business with minority- and female-owned firms.

c. Lack of Oversight and Enforcement of Existing Procedures

Several of the officials interviewed expressed concern over the lack of oversight to ensure adherence to existing procedures. These concerns range from insufficient audits or reviews of the various cabinets’ internal control systems, to widespread use of discretionary purchasing mechanisms such as the Procard, to lack of verification of contractors’ adherence to minority business utilization commitments.<sup>254</sup> One official expressed the opinion that the Finance and Administration Cabinet should provide more monitoring and oversight of contractors’ adherence to their minority business utilization commitments, and that this oversight should also extend to tracking and verifying information obtained from contractors regarding their contracts with the Commonwealth.<sup>255</sup> As previously noted, this was also a concern of the State Auditor. Even Finance and Administration officials note that they have often been advised that they should require prime contractors and architecture and engineering firms to disclose the members of their teams and their fee arrangements.<sup>256</sup> These officials emphasize that,

---

<sup>253</sup> PPI Nos. 1, 10

<sup>254</sup> PPI Nos. 1,2,3,13,20,25.

<sup>255</sup> PPI No. 1.

<sup>256</sup> PPI No. 2.

while any goals established in the past have been on a voluntary basis, oversight is still possible because contractors are advised that they can be audited at any time.<sup>257</sup>

d. Perception by Minority Businesses That Commonwealth Is Not Serious About Doing Business With Them

As stated above, some Commonwealth officials say they have met with resistance from businesses owned by racial and ethnic minorities because these business owners believe the state's efforts have been targeted toward white female-owned businesses, and not racial and ethnic minorities. Based on interviews with officials whose jobs would likely bring them in contact with racial and ethnic minority vendors, this type of skepticism regarding the state's interest in, and motivation for, doing business with them is pervasive.<sup>258</sup>

Another indication to some officials that many minority-owned businesses perceive the Commonwealth as not being serious about doing business with them is that some have said they were "steered" toward smaller contracts despite their capacity to handle larger ones.<sup>259</sup> This complaint is most often heard in the context of architecture and engineering contracting opportunities. Specifically, minority architects are steered toward the smaller, more discretionary price contracts as opposed to the larger ones that pass through the selection committees. One official opined Commonwealth personnel may be more comfortable doing business with people they already know, which is the reason that some companies are used consistently and others are steered away.<sup>260</sup> This of course, is recognizable as a restatement of a basic tenet of the good old boy system.

e. Bundling of Smaller Contracts to Create Large Ones

---

<sup>257</sup> PPI No. 2.

<sup>258</sup> PPI Nos. 1, 2, 16.

<sup>259</sup> PPI Nos. 2, 25.

<sup>260</sup> PPI No. 25.

Rather than steer prospective contractors to smaller contracts, officials have expressed concern over efforts by the Commonwealth to bundle smaller requirements together to create larger contracts that can be issued under statewide purchasing agreements.<sup>261</sup> Small minority-owned businesses are rarely able to bid on the larger contracts and the larger businesses are sometimes powerful enough to resist compliance with state equal opportunity requirements. One example cited by an official was a lumber supply contract that the state put out for bid in the early 1990s. The successful bidder, a national supplier that had held the contract for many years, refused to send the required equal employment opportunity form and affirmative action plan until the matter became highly publicized and controversial, requiring months to resolve.<sup>262</sup>

f. Use of Bids to Avoid Change Orders to Minority Businesses

Another official expressed concern over the often-used practice of letting a bid for goods or services that would normally be obtained through a change order to the existing contract, a tactic used often when the incumbent supplier is a minority-owned business.<sup>263</sup>

g. Slow Payment

Slow payment by contractors as well as the Commonwealth is not an uncommon complaint facing Commonwealth officials. One official cited a minority businessperson who was told by the Commonwealth that he would not be paid because his invoice was sent in at the end of a fiscal cycle and there was no money available to pay him at the time in question.<sup>264</sup> It appears that holding a valid contract with the Commonwealth that authorizes the amount in question is not a bar to this situation and contractors are not notified in advance of rendering service that payment may be delayed from a few months to over a year if their invoices are not timed exactly right.<sup>265</sup>

---

<sup>261</sup> PPI No. 25.

<sup>262</sup> PPI No. 7.

<sup>263</sup> PPI No. 25.

<sup>264</sup> PPI No. 25.

<sup>265</sup> Finance & Administration, GSPC telephone inquiry, 1-18-01.

h. Inflexible Specifications and Requirements

Some officials expressed concern that some of the Commonwealth's standard specifications are onerous and unnecessary, not only for minority businesses, but for others as well.<sup>266</sup> One example cited was a requirement for five years' experience for bonding.<sup>267</sup>

i. Point Structures for Source Selection

Some contracts with the Commonwealth are awarded on the basis of total points received during the source selection process. The point structures often include assignment of a significant number of points to firms' work histories with Commonwealth agencies. The perception among some Commonwealth officials, and as expressed to them by some minority business owners, is that this system discourages minority businesses from bidding on contracts because, historically, minorities have not done significant work for the Commonwealth and cannot gain points for this criterion.<sup>268</sup>

j. Stereotypical Attitudes

Some officials observed that perceptions among their colleagues that minority firms are smaller and, therefore, must be more expensive and less experienced than the larger firms; hence, they are viewed as a greater risk.<sup>269</sup>

k. Inconsistent Contracting Policies

Some officials were concerned that inconsistent policies, such as those governing use of out-of-state vendors, send confusing and discouraging signals to minority businesses interested in doing business with the Commonwealth.<sup>270</sup>

---

<sup>266</sup> PPI Nos. 1, 19.

<sup>267</sup> PPI No. 19

<sup>268</sup> PPI No. 20.

### 1. Inadequate Minority Business Database

Officials expressed frustration that the state's records have not progressed to a more comprehensive listing of available minority businesses. One official was concerned that buyers, who are overwhelmingly Caucasian, are provided vendor lists that include few minorities.<sup>271</sup> Other officials stressed the difficulties associated with tracking minority vendor utilization through the finance and accounting system.<sup>272</sup> Throughout the course of this study, it was apparent that the Commonwealth has had little, if any, success in consistently identifying minority businesses, making the information uniformly available throughout the cabinets and agencies, and then capturing the figures that accurately reflected the utilization of such businesses throughout the Commonwealth.

## **Conclusion**

One is not likely to find fault with the Commonwealth's laws or manuals insofar as technical direction for purchasing and contracting is concerned. All of the essentials are in place in that regard. The issue for minority and female-owned businesses seems to be that, outside of any federally imposed mandates, the Commonwealth has no cohesive purchasing policies that will do anything other than maintain the status quo. Data were gathered more than a decade ago from legislative committee hearings, roundtable discussions, and other sources to show that minority-owned businesses believed they were excluded from purchasing and contracting. Purchasing statistics, although somewhat limited, were gathered to show that the percentages of dollars purchased from minority businesses were extremely low when viewed against total purchases. A law authorizing the setting aside of certain contracts for minority-owned businesses was enacted, but never implemented. Despite the fact that the data did not meet Croson standards, it was sufficient to provide institutional knowledge to the Commonwealth more than a decade

---

<sup>269</sup> PPI No. 20.

<sup>270</sup> PPI Nos. 2, 19.

<sup>271</sup> PPI No. 19

before this study began, that would, at minimum, support race and gender neutral changes to policies and procedures in order to remove barriers for businesses seeking to supply goods and services to the Commonwealth.

Responsibility for purchasing and contracting is vested by law in the Finance and Administration Cabinet; therefore, it would stand to reason that design and implementation of a cohesive plan for removal of barriers to contracting would begin there and then flow to the other agencies to which purchasing authority is delegated. Yet, it is in Finance and Administration where the policies seem more convoluted and the barriers more rigid. These include, but are not limited to, the unresolved interpretation of the minority set-aside law; inadequate staffing of the Office of Contract Compliance to ensure contractors comply with current laws; inconsistently applied unwritten policies regarding use of out-of-state firms; unnecessarily broad definition of disadvantaged or minority firms; unnecessarily restrictive source selection criteria; lack of cohesive or comprehensive minority and female vendor database; slow payment; failure to audit cabinet small purchase procedures and activities; etc. By moving decisively to address these concerns throughout its own cabinet, the Finance and Administration Cabinet would provide the example and guidance for which other cabinets look to it.

---

<sup>272</sup> PPI Nos. 21, 25.

## V. Analysis of Qualitative Evidence

### A. Introduction

The contents of this section constitute a categorized summary of anecdotal evidence that exists in the Commonwealth of Kentucky. The anecdotal evidence summarized here is organized to highlight trends noted in interviews with business owners, as conducted for this study. These trends address factors that appear to be affecting the formation, development, availability, and participation of MBEs and WBEs in the Commonwealth of Kentucky.

It is important to note that these reported allegations should only be viewed in their totality as reflections of general patterns of marketplace discrimination. Such allegations should neither be relied upon nor acted upon on an individual basis. Rather, they should be viewed in the context of quantitative disparities and an assessment of whether more than just a few isolated allegations of such discrimination are likely to be valid.

The framework for the collection and analysis of anecdotal evidence of this study is pursuant to the Supreme Court decision in City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989), as well as in compliance with subsequent legal decisions.

The collection, organization, and preparation of the anecdotal accounts reported herein were culled from numerous confidential interviews with persons from the Commonwealth of Kentucky, who reside and/or operate their businesses within the Commonwealth of Kentucky marketplace. These interviews included more than 60 MBE/WBE contractors, public officials, and related businesspersons. Each interview was conducted by this firm in furtherance of the objectives of this study.

Each interview session and subsequent interview report reflects the nature of the views and responses of the interviewees. The interview reports are maintained as part of

the privileged and confidential files of this firm, and may only be released upon an express written waiver of confidentiality by the interviewee, or disclosed in camera under a protective order of a court of competent jurisdiction.

In the text that follows, we have included excerpts from interview reports to illustrate conclusions drawn about assertions made by interviewees as a group. These citations are not exhaustive, but are intended to be illustrative of supporting evidence contained within the confidential interview reports. The citations contained in this section should be understood as follows: (I.R.7) refers to "Interview Report No. 7".

Throughout this section, the interviewees identified many distinct forms of discrimination that appear to presently afflict the Commonwealth of Kentucky's marketplace. These forms of discrimination can be broadly classified into three categories:

- General Market Conditions and Barriers
- Discrimination That Adversely Affects the Ability of MBE/WBEs To Compete, and
- Discrimination That Adversely Affects The Viability And Capacity of MBE/WBEs

Within each of these broad categories, there exist several specific forms and patterns of discrimination and barriers to success. Combined, these create severe obstacles for MBE/WBEs. They are detrimental to the efforts of MBE/WBEs to compete successfully within the marketplace while they thwart their effective incorporation into the mainstream of Kentucky's business marketplace.

In addition to the three broad categories of discrimination, we identified a fourth broad category, Remedies. This final area of investigation focused on potential measures that could, in the opinion of the study's respondents, counter the forms of discrimination identified in categories A, B, and C above.



The following text includes specific remarks from interviewees expressing their views on the four broad categories outlined above.

## **B. General Market Conditions and Barriers**

An overview of the responses of several M/WBEs indicates repeated instances of both specific and non-specific barriers that often prevent minority firms from entering and competing in the marketplace. Further, these responses indicate a wide range of problems facing minority and women-owned firms that include:

- Denial of opportunities to bid
- Lack of Access to End-Users
- Double standards in performance
- Exclusion from the “Good Ol’ Boy” Network
- Collusion
- Lack of Access to Contracts
- Burdensome Contracting Requirements
- Difficulty Obtaining Access to Capital

Interviewee responses also reflect other activities and obstacles that cannot be easily categorized but which impede their ability to conduct business. In the aggregate, typical M/WBE responses reflect pervasive and persistent patterns of discrimination in the Commonwealth of Kentucky.

### ***1. Denial of opportunities to bid***

---

Based on our interviews, we determined that many M/WBEs find they are foreclosed from the bid process despite efforts by vendors to include themselves in the process. More specifically, many M/WBEs, especially in the construction industry, find that State contracts let for bid are usually too large for the limited resources of even the

more prominent local MBE contractor. There has been a trend away from breaking out bid packages by the State. The State appears to prefer to leave the decision regarding what work will be performed by the General Contractor, and what work will be subcontracted to other companies to the general contractor. Where there is no requirement for minority participation MBEs are rarely invited to bid. (I.R.# 36)

A MBE contractor related a situation where he was discussing upcoming bids with a prime contractor he generally bids to on a regular basis. The prime had a list of jobs for which he was explaining the scope of work of the contracts to the MBE. When the MBE noticed there were jobs listed for which no explanation of the scope of work was being provided he inquired about those jobs. The prime responded as to each, "Oh, don't worry about that one, they don't require minority participation." The MBE was disappointed because he thought they had developed a working relationship that would enable the MBE to bid on any project this prime had. (I.R.# 13)

Complaints among M/WBEs covered a variety of areas; but most were consistent in reporting pervasive attitudes, and discrimination, which contributes substantially to their inability to bid on jobs within the Commonwealth of Kentucky. Statements were made by some interviewees who implicate employees of State government as some of the primary proponents of the "good ol' boy" system, which operates very effectively to keep M/WBEs at bay. (I.R.# 18)

Another complaint of a number of interviewed M/WBEs was that too often bid packages are received just days before they are due. (I.R.# 5,13,20,34) The lack of notification serves as a serious obstacle to small firms wishing to submit a bid. In construction, plans and specifications must be acquired, bid and performance bonds must be paid for and obtained, and detailed estimates must be calculated before a bid may be submitted. Once again, the small contractor with limited resources can rarely accomplish these tasks in the short time allotted.

Four WBE firms expressed concern that the bid opportunities posted on the Internet site are very difficult to interpret. (I.R.# 18) In fact, these firms found it difficult to determine what category of business the bid represented. The same WBEs and numerous MBEs stated they have received invitations to bid which in no way relate to the services they provide, but they do not receive invitations to bid for the services they provide. (I.R.# 7,37)

Several MBEs in the construction industry expressed that they were confident that many bids posted online were let before they were posted, and that the Commonwealth of Kentucky was “going through the motions.” (I.R.#4,37)

## ***2. Lack of Access to End-Users***

---

The Commonwealth of Kentucky was described by more than one vendor as a “who you know” bureaucracy. (I.R.# 32) If a business owner has not been able to establish some sort of relationship with an individual empowered to make purchasing decisions, that business owner is very unlikely to achieve success within the Commonwealth of Kentucky procurement process. Numerous interviewees reported making “pilgrimages to Frankfort” for the express purpose of soliciting business from individuals within the various departments and cabinets. (I.R.# 3,4) Most reported they were received cordially, but they also reported they received no invitations to bid, or consideration of any kind from the departments and cabinets solicited. (I.R.# 3,18)

One interviewee described the process as a “complete and total waste of his time and resources, because the intent of the Commonwealth is not to do business with minorities.” (I.R. 4) Other interviewees felt there is a lack of awareness and education regarding services performed by minority companies. (I.R.# 23) Many feel that the Commonwealth disregards those M/WBEs who make a determined effort to market their

specific services to those cabinets within the Commonwealth government that can utilize their services. (I.R.# 3,4,18,24,40)

Some women interviewees noted reluctance and sometimes an outright refusal on the part of customers to do business with females, especially, who make their living in male-dominated fields. (I.R.# 3,18,19)

### ***3. Double Standards in Performance***

---

Numerous MBE interviewees reported incidences of the application of “double standards” to their work product. This is demonstrated in the expectations and general attitudes to which MBEs are subjected, and at times, how the work of minority firms is inequitably scrutinized. (I.R.# 37)

One MBE staffing firm reported being asked to provide criminal history checks and drug screenings for the temporary employees the MBE firm was marketing to a company who knew the staffing firm was minority-owned. This process would have cost the MBE firm in excess of \$100.00 per employee. The MBE began calling competitors to inquire as to whether similar requests had been made of them, and each responded that they had not. (I.R. 29)

Several different MBE construction contractors reported stricter scrutiny of their work in comparison to similar work performed by majority competitors, such as detailed inspections and a general feeling that MBE work must be twice the quality as that of a non-MBE. (I.R.# 37)

One MBE engineering firm reported a project manager on a State project undertook to determine what other projects the MBE was working on at the same time as the State project, and made calls to the Project Managers on the other sites to determine how many people the MBE firm had employed on the other sites. (I.R.# 37)

#### ***4. Exclusion from the "Good Ol' Boy" Network***

---

Almost all of the M/WBEs interviewed associated their difficulty with attaining access to the parties within the marketplace who have the ability to award contracts, with the power and the pervasiveness of the "good ol' boy" network in the Commonwealth of Kentucky. The "good ol' boy" network is comprised generally of a group of highly successful and influential Caucasian males who dominate and control all of the major business in the Commonwealth of Kentucky.

The "good ol' boys" were described as having a "stranglehold" on any Kentucky business worth having by several M/WBEs. (I.R. 14) A community activist stated that "politics is too heavily involved in the business of the state." (I.R. 38)

Several MBE firms stated that "the 'good ol' boy' network is so strong that they feel they can just disregard us (MBEs) whenever they want." (I.R.# 1,5)

The consensus of an interview with another MBE firm was that the "good ol' boys" are able to effectively manipulate the system so that only the contracts the "good ol' boys" are willing to give up to others escape their grasp.

#### ***5. Collusion***

---

Another form of marketplace discrimination that frustrates fair and equal access to the marketplace is collusion. It is the firm belief of one MBE contractor that the Department of Transportation regularly engages in collusion, and that the winners of bids are predetermined. (I.R.# 4,17,34)

A WBE firm stated that she went to a department office to obtain information for a bid, and was laughingly told, "Don't you know this has already been decided?" (I.R. 20)

## ***6. Lack of Access to Contracts***

---

Too often MBEs are so far removed from the process within which contracts for work are created that they (MBEs) only become aware of the contract after the bid process is well underway or the contract and subcontracts have been awarded. (I.R.# 3,13,14,17,31,34)

The representative of one MBE consulting firm stated, "There are individuals within city, county, and state government who know where the opportunities lie, but refuse to disseminate the information to be shared by those who stand to benefit the most, or are unable to disseminate the information to enough people." (I.R. 31)

## ***7. Stereotypical Attitudes***

---

Many MBEs reported stereotypical attitudes on the part of customers or buyers as a major barrier to successful incorporation of M/WBEs into the marketplace. Many of those interviewed felt there is a general lack of confidence in the ability of MBEs to competently complete the contracts that they are awarded. (I.R.# 3,16,31)

## ***8. Burdensome Contracting Requirements***

---

M/WBE interviewees reported a number of burdensome practices limiting their ability to compete for contracts with the Commonwealth of Kentucky. A somewhat covert device used by the Commonwealth to discourage or limit the participation of M/WBEs in the marketplace is the pre-qualification procedure. (I.R.# 17) Two MBE contractors reported that the state determines the capacity of a company to do business with the State through its pre-qualification determination. Whatever dollar figure in total

business is assigned to the business is the business' limit. (I.R.# 17) They further reported there is no logic to their determination. (I.R.# 17)

Another means the Commonwealth uses to limit participation by M/WBEs is through the requirement of bonding for both the bid and performance of the contract.

Most majority companies and municipal entities recognize that M/WBEs cannot afford to wait for payment beyond the specified times in the contract, yet neither will provide advances to cover payroll, materials, or pay invoices in accordance with the schedule in the contract. Instead they pay invoices 60-90 days past due, and sometimes longer. (I.R.# 3,14,18) The smaller M/WBEs complained that the volumes of paperwork required to do business with the Commonwealth were not worth the time and effort away from more lucrative projects. (I.R.# 7)

#### ***9. Difficulty Obtaining Access to Capital***

Capitalization is another often-cited market barrier for M/WBEs. One WBE firm reported that when her firm was initially established, she had great difficulty obtaining financing. At one point, she was receiving contract financing from Bank One for her substantial payroll. At 4:50 p.m. one day before her payroll was due, Bank One contacted her to say they would no longer provide contract financing. This WBE does several million dollars per year in business. She was forced to sell her receivables to a factoring company, and to take a substantial loss as a result of Bank One's actions. (I.R. 19)

An MBE consulting firm stated that MBEs are usually directed to public sector financing sources, and branch offices of banks to secure financing. They rarely see the inside of a commercial lending department whose business is business loans, preventing the MBEs from receiving the advantages of access to commercial lending expertise. (I.R.# 31)

**C. Discrimination That Affects the Ability of M/WBEs to Compete**

Business by nature is competitive. The ability to compete is an essential component of fiscal survival for owners of companies. Among the numerous accounts of efforts to compete that were adversely affected within the State system several themes emerged:

- Stereotypical attitudes
- Bid Shopping
- Bid manipulation/Unfair Denial of Contract Awards
- Discrimination in Bonding
- Discrimination in Financing
- Discrimination in Payments
- Customer/End-User Discrimination
- Discrimination by suppliers
- Use of Front Companies and Pass Throughs

***1. Stereotypical attitudes***

---

Responses from M/WBEs interviewed indicated that a continuing legacy of discrimination, which takes the form of stereotypical attitudes, is commonplace. Many MBEs reported stereotypical attitudes on the part of customers or buyers as a major barrier to successful incorporation of M/WBEs into the marketplace. Many of those interviewed felt there is a general lack of confidence in the ability of MBEs to competently complete the contracts that they are awarded. Some of these misconceptions include the following:

- MBE/WBEs are unable to successfully own or manage a business, or



- MBE/WBEs are generally incompetent; or
- MBE/WBEs are lazy

Although these are not statistically identifiable forms of discrimination per se, prejudices of this type adversely affect MBE participation in the marketplace in a variety of ways. Customers and suppliers who harbor these types of attitudes may refuse to conduct business with MBEs.

Two different MBE firms reported similar occurrences where they had each scheduled appointments with potential clients to discuss the possibility of work. Neither potential client was aware their interviewee was a MBE company. Upon arrival each MBE was almost summarily dismissed from consideration, and never heard from the potential client regarding an opportunity to do business. (I.R.# 1,36)

One MBE firm stated that when he calls on companies that have minority programs they (the buyer) seem to be enthusiastic until they know a minority company can perform. (I.R. 24)

Many MBEs reported that the general perception is that a bad experience with one MBE makes all other MBEs a bad risk. (I.R.# 13,17,28) Yet another MBE firm reported, "the general contractors treat one MBE as all only when they fail to perform up to standard." (I.R. 31) Generally, WBEs in traditional professions, such as public relations, communications, graphic design, upholstery and staffing, to name a few, are accepted.

Those in non-traditional female employment, such as engineers, architects, industrial supply, and construction are not widely accepted. Women in non-traditional employment have reported refusals by men to do business with them. (I.R.# 9,7,3) Most women in business, traditional and non-traditional report having been called, "honey, baby, sugar," and the like at some point. (I.R.# 3,9)

In these instances, M/WBEs are blocked from opportunities to grow their businesses. The everyday demand of operating a small business is consuming enough, but when the burden of defending its livelihood against unproven negative assumptions about its work and business worth is added an unfair disadvantage is created for the MBE business.

MBEs interviewed reported that they are tolerated only so much as they must be in most cases, and where MBE participation is not required it generally is not utilized by majority companies. (I.R.# 36)

## ***2. Bid-shopping***

---

A form of marketplace discrimination that limits fair and equal access to the marketplace is bid shopping, which occurs frequently in the construction industry. Bid shopping is a process used by general contractors to lower the price for completion of a portion of a job submitted to them by subcontractors. This practice occurs after the general contractor has viewed the bids submitted by the competing subcontractors. The general contractor will then approach one or some of the “preferred” subcontractors with the lowest price quote received, and provide them the opportunity to beat the lowest bid. Bid shopping operates to belie the award to the lowest bidder process, and maximize profit for the general contractor at the expense of the subcontractor who can least afford the loss.

A MBE contractor described bid shopping as a “fact of life in the construction business in this state.” (I.R. 47)

A WBE firm reported that the owner now hand delivers her bids minutes before they are due to avoid this problem. (I.R.# 19)

One MBE electrical contractor named several general contractors who are ruthless about the bid shopping process. (I.R. 13)

### ***3. Bid Manipulation/Unfair Denial of Contract Awards***

---

Several M/WBEs indicated experience with the unfair denial of contract awards. This form of discrimination occurs when the M/WBE is given a chance to bid on some or all of a contract, and the award of the contract is unfairly denied.

Bid manipulation is another means by which majority firms and governmental entities discriminate against M/WBEs. The bid manipulation process takes place in several different ways. The majority firm or governmental entity may unethically and illegally provide bid information to select bidders, tailor a particular bid prior to bid opening, or alter the bid after the bids are opened to exclude M/WBEs from participation.

A WBE firm reported a bid she originally won with the Revenue Cabinet which was subsequently "thrown out" due to a failure to advise all parties of an "essential item" within the bid that would affect the price quotation on the bid. The WBE firm assessed the "essential item" and determined it was not only not essential, but would not affect the price quotation on the bid. She resubmitted her previous number, and was outbid by .08/hr. by the major company (Olsten), which had held the contract for the three preceding years to this bid. (I.R.# 19)

This WBE reported that there was an error in Olsten's bid package that should have caused it to be thrown out, but Purchasing opted to allow the bid package to remain in consideration. (I.R.# 19)

When she complained to the Purchasing Department that she felt she had been unfairly deprived of the bid they neglected to inform her of their formal process to contest the award of the bid to Olsten. The WBE was instead told that her complaint would be forwarded to the appropriate party for resolution. She never received an acknowledgment or response of any kind to her complaint. (I.R. 19)

#### ***4. Discrimination in Bonding***

---

Several MBEs reported difficulty in obtaining bonding, which has created a significant barrier to their ability to conduct business in the marketplace.

At one point, the Commonwealth had instituted the Minority Bond Assurance Program that operated successfully to provide bonds to a number of M/WBEs. It was dropped a few years ago after it was discovered that an administrator had embezzled a large sum of money from the program. Since that time some of the MBEs who have been able to become bonded have utilized a variety of resources, such as referrals from friends, and majority contractors who utilize them as subcontractors who will either allow their bond to cover the subcontractors work or encourage their (the majority company's) bond agent to bond the MBE subcontractor. (I.R.# 13)

## **5. Discrimination in financing**

---

Financing is a basic and very efficient means to limit or exclude a business from competing in the marketplace. Discrimination in financing can take many forms, all of which usually result in MBEs (more so than WBEs) not obtaining the capital needed to sustain their businesses. Historically, the finance industry has had a poor record of lending to minorities.

One MBE contractor explained the problem financial institutions have with MBEs as, "They have no useful point of reference for a successful MBE model, and tend to revert to stereotypes of minorities which inhibits MBEs growth and progress". I.R. 14

Another MBE contractor stated, "the credit criteria is more stringent for MBEs than other businesses." (I.R. 42) Yet another MBE firm believes the problem lies in the non-availability of multiple sources of financing. (I.R.# 31)

A WBE firm looking to expand her relatively new consulting business is finding it very difficult to obtain financing for the venture. She lacks a bank track record, in large part, because her parents lent her the startup capital, and the bank does not feel there is sufficient equity in her business to grant the loan, even though she has experienced substantial growth since the inception of her business. (I.R.# 30)

Several other WBEs expressed reluctance to consider the possibility of bank financing for reasons ranging from the process being altogether too invasive and cumbersome to being afraid to risk their assets. (I.R.# 35,36)

## **6. Discrimination in Payments**

---

MBEs, particularly in the construction industry, report significant cash flow difficulties due to slow payment and non-payment by majority prime contractors. MBE interviewees in the construction industry complained about not being paid in accordance with the terms of their contracts. One MBE contractor stated, "if the contract says 30 days you can rest assured payment will not be received before 60-90 days." (I.R. 13 & 42). A WBE supplier company stated, "large companies and the State take the longest to pay...60-90 days." (I.R. 18) A MBE contractor stated it can take as long as six months to get paid by general contractors. (I.R.# 3,36)

An MBE firm stated that on one occasion he contacted the Commonwealth regarding payment of his invoices, and was advised his contract was misplaced and would have to be re-signed before payment could be issued. After the contract was re-signed, he did not receive payment for six months, and then only partial payment was received. (I. R. 36)

## **7. Discrimination by Suppliers**

---

During the interview process M/WBEs cited experiences with discrimination by suppliers, which have affected their ability to compete.

A MBE paving contractor, a WBE industrial supplier, and a WBE decorator all cited instances where their suppliers have become their competitors in the bid process. (I.R.# 18,20,48)

Purchasing goods for resale or a separate use necessitates the down-line user will pay a higher price for an item than the seller. If both buyer and seller are bidders on the same project, seller shall have a distinct price advantage over buyer.

A WBE staffing firm maintains that insurance costs for her employees have increased 29% each year for the past two years. This WBE maintains that although her company generates millions of dollars in revenue each year, only a small portion of the revenue generated is profit. She is certain her larger competitors in the marketplace are receiving some kind of volume discount or they would not be able to consistently beat her price quotations on bids. (I.R.# 19)

This is just one more example of why the insertion of large companies into the marketplace as direct competitors of small companies adversely affects the small company's ability to compete.

#### ***8. Use of Front Companies and Pass-throughs***

---

Many M/WBE interviewees reported knowledge of companies that function as "fronts" for majority companies. A front company is generally set up as M/WBE owned, but is controlled and operated by a majority company. It is also very common practice for a majority company to solicit the use of a MBE or WBE, for its name only, to fulfill the majority company's obligation to utilize an MBE or WBE, in exchange for a small percentage (usually 5-10%) of the total contract awarded. This practice is known as using the M/WBE as a pass-through.

Numerous M/WBEs interviewed indicated that they had been approached to act as pass-throughs for majority companies. Most M/WBEs find the notion offensive largely because it trivializes the work minority and women entrepreneurs put into the maintenance and operation of their businesses. (I.R.# 3,12,13,17,18,25,34,42,48)

Fronts and pass-throughs give the appearance of performing successfully, significantly more business than they actually perform, which appears as if M/WBEs are competing successfully in the marketplace.

One MBE contractor got his start in business because there was such a strong need for his particular services. This MBE notes it was clear that the majority company, which helped get them started in business, intended to use them only as needed. (I.R.# 13)

#### **D. Discrimination That Affects the Viability and Capacity of M/WBEs**

In the interviews conducted for this study, several areas of discrimination were identified that placed limitations on the abilities of M/WBEs to maintain their viability and capacity, thus affecting their long-term availability. These areas included:

- Fronts
- Government Resistance to M/WBE Participation
- Unequal Access to Financing
- Unequal Access to Bonding
- Slow Payment and Non-Payment
- Limitations on Access to Contracts

##### ***1. Fronts***

---

It is widely perceived by many of the MBEs and WBEs interviewed that the creation and utilization of MBE/WBE front companies for the purpose of fulfilling minority participation requirements severely affects the ability of legitimate M/WBEs to compete in the Commonwealth of Kentucky marketplace.

There have been instances reported of majority owned and/or controlled businesses which have been able to obtain MBE/WBE certification, (albeit through fraud and misrepresentation), and have been able to obtain the benefit of programs and contract opportunities designed to aid legitimate MBEs and WBEs. Several years ago the Commonwealth of Kentucky Department of Minority Affairs, headed by Maurice Sweeney, conducted an extensive investigation into the legitimacy of a number of suspected front companies, and spearheaded efforts to make the creation and utilization



of front companies a criminal act. As a result of these actions a number of companies were decertified from their MBE/WBE status. (I.R.# 21)

MBEs in the contracting industry particularly appear to suffer the most as a result of the business losses sustained as a result of MBE and WBE fronts. The contracts that the front companies are able to secure deprive legitimate M/WBEs of the opportunity to perform upon those contracts, and add to minority participation statistical data that is not, in fact, accurate or truthful.

One of the interviewees for this study was designated a WBE firm. All of the owners are Caucasian. At the time of the interview there were only two offices within the company's office. The Caucasian male interviewed occupied one office. Another Caucasian male who was referred to by the gentleman interviewed as his "partner" occupied the other office. Although the interviewee indicated the firm's ownership was divided equally at 25% each between the interviewee, his "partner", and each of their wives, there was no evidence in that office of participation by either female partner in the operations of that business. (I.R.# 6)

Most interviewees who were willing to discuss fronts felt that WBEs had created the greatest negative impact on MBE business. The general perception was that Caucasian women are not minorities, yet are able to benefit from having minority status in the marketplace. This view is consistent with the view expressed by most of the Caucasian female business owners interviewed. (I.R.# 7,9,10,11,18,27,41) Some Caucasian females experienced some difficulty transcending gender lines in their respective professions, but none of the Caucasian females interviewed perceived themselves as disadvantaged. (I.R.# 7,9,10,11,18,27,41)

## ***2. Government Resistance to M/WBE Participation***

---

Several themes arose during anecdotal interviews with M/WBEs regarding the role of the Commonwealth of Kentucky in the failure to assimilate M/WBEs into the stream of commerce. Many M/WBEs reported that the Commonwealth of Kentucky's lack of involvement in the assimilation of M/WBEs has a detrimental effect on the ability of M/WBEs to gain equal access to contracting opportunities.

When opportunities are made available, interviewees reported that the Commonwealth tends to set unrealistic specifications for bidders in some instances which may require years of experience for a relatively simple task, or full-time staffing of a given number of employees for a job which will last only a few months. (I.R. 12)

A great deal of concern was expressed that the Commonwealth needs to closely monitor any program that is enacted to assimilate M/WBEs into the stream of commerce. It must be closely monitored to assure that the levels of participation by M/WBEs are accurate. In the past there has been no monitoring system of this type, and many fronts and pass-throughs have benefited as a result of this problem. (I.R.# 38)

Although the Commonwealth can eliminate a great deal of administrative responsibility by letting larger and larger contracts for bid, this process eliminates most M/WBEs from competition, because they generally cannot sustain the burden of million dollar contracts. This represents another means by which the Commonwealth's policy poses an obstacle to the incorporation of small business into the general system of purchasing. Essentially, the Commonwealth has created a "glass ceiling" in contracting above which M/WBEs are unable to compete.

Many interviewees reported corruption within the bid process, suggesting that M/WBE participation is not a high priority for the Commonwealth. There were numerous reports from M/WBEs that 1) there are many contracts which are simply awarded and never let for bid, 2) bids once received are manipulated, and 3) collusion is prevalent throughout the process. (I.R.# 1,2,3,5,14,19,28,31,34,38,42)

MBEs especially feel they are virtually ignored throughout the Commonwealth of Kentucky's purchasing system. MBE interviewees indicated their feeling that things are not likely to change anytime soon, but they remain hopeful.

### ***3. Unequal Access to Financing***

---

Many M/WBEs interviewed cited personal experience or a strong reluctance to attempt to finance their business needs through the local banking industry. Most were aware of the difficulty of obtaining a commercial loan. The majority of these M/WBEs built their businesses from the ground up utilizing whatever personal resources they had available and added needed assets, as they were able. (I.R.# 1,3,5,7,13,19)

Capitalization is critical to the successful continuation of any business. Lack of access creates a major barrier to success. Some M/WBEs interviewed indicated a willingness to participate in the process where they feel their efforts are not essentially an exercise in futility. (I.R.# 29,30,35,36,47)

A typical example of the problems encountered by M/WBEs might be a loan application made for a specific amount of money for a specific purpose. The M/WBEs have reported that if their loans are granted at all, they are often for a sum less than that requested, and inadequate for the stated need. This scenario regarding banking practices was recited by a number of M/WBEs who were frustrated with the entire process. (I.R.# 1,3,19,30) Some stated success in their goals through means other than traditional bank financing others ceded to circumstances.

### ***4. Unequal Access to Bonding***

---

M/WBEs interviewed related difficulty in obtaining bonding. Although bonding requirements posed a significant barrier for some M/WBEs for those who are required to be bonded the expense of maintaining bonding posed a great burden to the cash flow of the business. (I.R.# 1,2,3,5,12,13,14,17,20,29,31,36,48)

Others complained about not knowing whom to use to obtain bonding, and not knowing what documents are needed for the process. (I.R.# 47)

Cash requirements that drain funds from the resources of a business without assurance of a return on the investment can negatively impact the viability and capacity of a business to be successful in the marketplace. In the case of M/WBEs with limited financial resources this is absolutely the case.

### ***5. Slow Payment and Non-Payment***

---

Many M/WBEs interviewed cited slow payment or non-payment by general contractors and State agencies as a form of discrimination that severely frustrates M/WBEs ability to perform or maintain their businesses. There were numerous accounts, particularly in the construction field; M/WBE interviewees in this field felt that such clients and prime contractors purposely and maliciously made late payments to remind M/WBEs of their vulnerability. (I.R.# 13,14,17) Interviewees generally recognize they cannot be paid until the company that contracts their services is paid from the owner. It is when the company that contracts the M/WBEs services is paid, and fails to pay them that problems result which adversely affect the viability and capacity of M/WBEs.

A non-construction WBE stated that "Large companies and the State take the longest to pay. Both tend to pay in 60-90 days." (I.R. 18)

All of the construction-related M/WBEs interviewed reported difficulty of some sort in receiving their payments from general contractors. Receiving payment in accordance with the time schedule in the contract is virtually a non-occurrence.

A non-construction MBE reported that his contract was "misplaced" after he sustained "difficulty" with State employees on a project. When he submitted his invoice for payment to the State he was informed that a new contract must be signed before

payment could be made. Once the contract was re-signed it took six months to receive a partial payment of his invoice. (I.R. 37)

## ***6. Limitations on Access to Contracts***

---

Almost all of the M/WBEs interviewed acknowledged the prevalence of the “good ol’ boy” network within the Commonwealth of Kentucky, and how it severely restricts the opportunities to grow one's business in the marketplace. Companies must have business to survive. If there is no business there is no revenue. The company will not be able to sustain itself, and will fail.

One M/WBE firm believes the worst discrimination occurs in excluding MBEs from information. This interviewee reported that M/WBEs are the last to know about upcoming projects, whereas majority companies know about them when they are little more than ideas. (I.R.# 31)

In Kentucky, interviewees reported that some projects are awarded without a bid. Numerous M/WBEs spoke of major projects which are announced in the newspaper as being awarded to a majority company of which they had personal knowledge but were never let for bid. (I.R.# 1,3,13,14,17,31,42,48)

One MBE construction contractor spoke of how the majority contractors in his particular segment of the industry meet at a popular local hotel once a month to determine how they will apportion the available work among themselves. (I.R.# 48) Another MBE stated MBEs “haven't a prayer of getting the major jobs.” (I.R. 5)

As discussed earlier, bid manipulation and unfair contract awards are additional means of limiting contract opportunities for M/WBEs.

## ***7. Remedies***

---

This final section addresses potential remedies to some of the barriers and forms of discrimination discussed in this analysis. All of the interviewees were asked what remedies were necessary to increase the availability and participation of M/WBEs in the Commonwealth of Kentucky marketplace. The following are recommendations made by the respondents.

The interviewees had very definite ideas about the components of any new M/WBE plan the Commonwealth of Kentucky entertains. Suggestions included:

- 1) Any M/WBE program needs a goal, specific criteria on admission, and limits on how successful a program participant may become before being required to exit the program.
- 2) Any M/WBE program must include a basic program of technical assistance designed to educate M/WBEs about how to function within the Commonwealth of Kentucky system.
- 3) Prime contractors who utilize M/WBEs must verify in writing whom their M/WBE participant was and how much the M/WBE was compensated.
- 4) The State needs to "get serious" about the inclusion of M/WBEs and create a system to incorporate M/WBEs within its stream of commerce. This will insure M/WBEs are able to attain the necessary, government-level experience required to perform State work.
- 5) There should be developed and maintained a comprehensive M/WBE list from which all State vendors shall have ready access to select their M/WBE participants, and which shall include all M/WBE vendors in the State.

The second major area of remedies addressed by the interviewees discussed was the bid process. The recommendations include the following:

- 1) The bid process in general needs to be simplified.

- 2) The bid process should be fair. Everyone should have an opportunity to bid on any item to be bid that is reasonably associated with his or her line of work.
- 3) Bid packages should be broken out to eliminate the systematic exclusion of M/WBEs who cannot bond or finance large contracts.
- 4) Set asides and/or preferences are necessary to "level the playing field".
- 5) Bid and performance bonds should not be required for contracts under \$50,000.00.
- 6) The State e-commerce bid site needs an index and structure.
- 7) The State e-commerce site needs to be updated completely and regularly and maintained with current listings. Once this is accomplished, all bids should be submitted and awarded online.
- 8) M/WBEs need more access to the State.
- 9) The certification process should be streamlined. Most consider the process too time consuming to complete.
- 10) A financing assistance program is needed to enhance participation by M/WBEs.
- 11) A program should be instituted to monitor slow and non-paying vendors.
- 12) There should be limits on the amount of business out of state business owners are awarded.
- 13) Incentives should be provided for incorporation of M/WBEs in the majority company's contract.

## **E. Disparity Study Public Hearing - Findings Report**

### ***Introduction***

In conjunction with the consulting team of Griffin & Strong, P.C., the Commonwealth of Kentucky reports the following results of public hearings held throughout the Commonwealth as part of an existing disparity study. This report will provide documentation of the fulfillment of designated requirements within the disparity study to hold public hearings to discover the experiences of M/WBEs in their attempts to participate in the Commonwealth of Kentucky marketplace.

On August 14, 2000, Griffin & Strong, P.C. convened the first in a series of seven public hearings throughout the Commonwealth of Kentucky. The final hearing was held August 18, 2000. The hearings were designed to elicit specific information, from willing participants, regarding their personal experiences with the Commonwealth of Kentucky's purchasing practices.

Each of the seven hearings was attended by Janet Hightower and Anthony Leachman representing Griffin & Strong, P.C. Donald Speer, Commissioner of the Department of Administration, Yvette M. Smith, Executive Director, Office of Equal Employment Opportunity and Contract Compliance, Robert S. Peters, Executive Director, Governmental Services Center, Henry Curtis, Attorney for State Parks and Tourism Cabinet, Floyd Taylor, former director Small and Minority Business, and Singer Buchanan, Jr., Deputy Secretary and State EEO Coordinator for the Personnel Cabinet attended some of the public hearings on behalf of the Governor's Minority Affairs Council, as the panel.

During the examination of each testifying witness, the Hearing Officer and the panel sought to obtain the perspective of minority business owners as it relates to various market barriers within the Commonwealth of Kentucky. These market barriers have, in the view of the participants, hindered their ability to do business in the general



marketplace in the Commonwealth of Kentucky. The following is a report of the identified barriers.

### ***Market Barriers***

#### **1. Denial of opportunities to bid**

The single most common theme throughout all of the testimony of the witnesses is the denial of opportunities to bid. Everyone who testified readily acknowledged a need to continuously create business opportunities for the survival of their business. Blocking M/WBEs from the process that provides business opportunities threatens their very existence.

The Commonwealth effectively denies M/WBEs the opportunity to bid in a variety of ways. One way the Commonwealth excludes M/WBEs is to set the contract to be bid at a number so large minorities and women cannot bond or finance the contract. Another means used is to award the contract outright without ever letting it for bid. In situations where the bid is let, and the "wrong" company is low bidder, it was documented the low bid was thrown out, and the project was re-bid. The Commonwealth has also forwarded bid packages that are received by some earlier than others. The final means we will discuss for this subsection is how the Commonwealth draws out the certification process to deny opportunities to bid to M/WBEs.

**Basha Roberts**, major stockholder, President, and CEO, of Lextech, Inc., a WBE computer consulting business based in Lexington, Kentucky. Lextech has been operating for eight years in the technology business, and does business in (16) sixteen states.

Ms. Roberts described her pursuit of an "Integrator Contract" which covers computer consulting and installation, and a "Help desk contract," which provides computer support services for the Commonwealth spanning a period from 1994 to the

present. Ms. Roberts related that she hired personnel for the specific purpose of obtaining this and other state business. During this process, she was told by state employees that there were only specific types of contracts she could obtain to be able to do work for the State, namely the Integrator and Help desk contracts.

When Lextech lost the bid in 1994, they tracked the next bid that was scheduled for 1996. The Integrator contract was awarded 6/1/96 without Lextech ever receiving notice of the bid even though they anxiously pursued the Department about when the bid would be let. They began pursuit of Helpdesk directly through the Helpdesk Department that interviewed Lextech personnel and reviewed their qualifications. The Helpdesk contract was awarded late 1996. Again, Lextech received no notice to bid.

Lextech again inquired as to when the next bid would be for both contracts and was told 1999. The Strategic Alliance Services contract was awarded in 1999 while Lextech was calling and corresponding with the Governor's Office of Technology (GOT) about when the bid would be let. They were informed of this July 13, 1999 by Mike Robinson in GOT. In May 1999, with the assistance of John Bridwell, Lextech was able to locate the bid package for the integrator bid, and sent in their bid in April 1999. All of the bids were thrown out April 27, 1999, and the contract had not been let at the time of her testimony.

**Elaine Brown**, Joy Temporary Services, a M/WBE temporary staffing agency which has been operational since 1996. Ms. Brown described attempts to familiarize herself with the bid process to service some of the State's staffing needs, but expressed considerable frustration with the discovery that the bids as structured are all for very large sums of money. Ms. Brown described Joy Temporary Services as a relatively small firm not capable of financially managing a multi-million dollar contract. Everything Ms. Brown viewed on the e-commerce site was well beyond Joy Temporary Services' capabilities.

**Cynthia Lindsay**, CEL Consulting Services, a M/WBE computer consulting firm described her very frustrating attempts to obtain a contract with the Commonwealth. Ms. Lindsay is the majority shareholder in CEL Consulting. She has made presentations to numerous State-affiliated departments and agencies in an attempt to solicit business for her company. Instead of invitations to bid, she gets job offers. She offered through her testimony if she is good enough to work for the State, why is she not good enough to be paid the hourly rate for her consulting services. When she calls departments she has solicited to check the status of Requests for Proposals (RFPs) she is told it is in the mail, yet they never arrive.

Ms. Lindsay stated she checks the website diligently, but finds no RFPs. She believes they are purposely hidden, or not there at all.

She states she has been successful in getting contracts in numerous other states, but Kentucky, even though she is a native, will not do business with her.

Almost everyone who testified acknowledged that some major contracts seem to get awarded without public bid.

**Janey Moores**, President and CEO, BJM & Associates, a well-established WBE human resource consulting firm testified regarding an experience she had which could be categorized as bid manipulation and possible collusion as well as a denial of opportunity to bid.

Ms. Moores bid a contract in either 1997 or 1998, which she won, or so she thought. Several days after the bids were opened, she was contacted by the Purchasing Department who informed her that the bid she won was to be re-let due to an error of omission of a critical item which could change the bid quotation. When the omitted information was forwarded, Ms. Moores deemed it inconsequential and submitted the same number she submitted previously. When the bids were opened, Olsten (the holder of the previous contract) underbid her by .08/hr. to win the bid.

Ms. Moores also reported that Olsten neglected to sign their bid that should have caused their bid to be rejected, but the State opted to overlook Olsten's omission as harmless, and awarded them the bid.

**Cornell Starks**, President, Starks and Associates, MBE Insurance Agency who has been in business eighteen 18 years, described his concerns with the bid process in receiving bids late. Mr. Starks described the insurance business as highly competitive. Vendors compete against each other for business, and for the services of underwriters. Mr. Starks indicated that too often he would receive his bid package in the mail, and immediately contact his company for a quote. The company would already have all of the information, and would have already provided a quote to another company, blocking Mr. Starks out of the bid. This occurred consistently prior to placement of bids on the State website.

**Robert Springfield**, Springfield Plumbing Company, an MBE contracting firm reported that the Commonwealth of Kentucky Department of Transportation (DOT) certification process denied him the opportunity to bid on the Caesar's Hotel and Casino project in Indiana. Springfield Plumbing is a Kentucky based minority business. Mr. Springfield (at the time of the hearing) was not a certified minority vendor in Kentucky. Indiana has M/WBE requirements on the Caesar's project, and requires all M/WBEs to be certified in their capacity by their home state.

Mr. Springfield forwarded his certification package to DOT May 8, 2000. It was confirmed received May 9, 2000. Between May 8, 2000 and August 16, 2000, Mr. Springfield was not certified, and had not been able to speak with anyone directly in the Department of Minority Affairs regarding any problems they may have with his paperwork which may have stunted the process.

The Caesar's bid has come and gone. Mr. Springfield was unable to bid the work, and remains frustrated with the process, because he still has received no response regarding his certification from the DOT or the Department of Minority Affairs.

## 2. Customer/End-User Discrimination

Many of the previous anecdotes relate to this category as well, and will not be reiterated, as that would be redundant. There are additional anecdotes that highlight this area.

**Cornell Starks**, Starks & Associates, MBE Insurance Agency, testified that when a bid he made with the University of Louisville was equal to the bid of his competitor for low bid the majority competitor was awarded the contract, because the competitor was experienced with long-term disability. The competitor was also the previous holder of the insurance contract, at issue.

Mr. Starks maintains that, as an agent there is nothing special about long-term disability claims which sets them apart from other claims.

In the interest of fairness, he spoke with officials at the University of Louisville about their preference for the majority competitor. He was offered additional consideration on another contract. However, nothing came to fruition.

**Michael Brazley**, Michael D. Brazley & Associates PLLC, MBE Architectural firm, also testified regarding an experience with the University of Louisville wherein he, after numerous unsuccessful bids, spoke with officials at the school directly concerning the possibility of getting business from them. Their response was that his company information had been lost.

**Reverend Louis Coleman**, Louisville Black Chamber of Commerce, testified that, "there is not an active mechanism to bring these folks (African Americans) in the process, and they need to be in the process." He also stated, "This is no secret what goes on in Kentucky... probably one of the worst states for diversity and inclusion of African-American contractors and business vendors in the United States of America."

Reverend Coleman testified further that the same contractors consistently get the work for the State of Kentucky. None of them are minorities, and they do not utilize M/WBE subcontractors. He also believes the Department of Finance is most racist of all.

**Leonard Paige**, MBE Contractor, testified that he has bid a salt hauling contract for the State several times now, and has never won a bid. He testified that he believes his contract was disregarded because the same person continues to be awarded the contract. They do not open the bids publicly, but when he inquires he is told he was not the low bidder. Then they tell him to call the contract awardee for work as a subcontractor.

**Donnie White**, Howard White & Associates, MBE Insurance firm, testified that there is a direct relationship between the award of a major contract, and the amount of money contributed to the Governor's campaign. He further states that Kentucky does not care how it treats minorities.

### 3. Bid Manipulation and Collusion

The point was made by several witnesses that a bid procedure in which bids are not opened publicly is inherently indicative of a process that can be, and probably is manipulated.

Several witness accounts detailed instances where bids are not opened publicly, such as that recounted by Mr. Paige on the salt hauling contract, and Mr. Starks on his insurance bid with the University of Louisville.

Lextech, through Ms. Roberts' testimony, encountered a different scenario. The bid they were seeking was listed under an unfamiliar and misleading name. Without the assistance they obtained, Lextech likely would not have been able to place their bid in April 1999.

Ms. Moores' experience with the bid she won and subsequently lost is yet another example of bid manipulation.

#### 4. Unnecessarily Restrictive Contract Specifications

Another process utilized by the Commonwealth of Kentucky which presents a barrier to the ability of M/WBEs to conduct business in the Kentucky marketplace is the requirement of unnecessarily restrictive contract specifications in bid packages.

Michael Brazley, Michael D. Brazley & Associates PLLC, testified about a recent bid let by the University of Kentucky for a canopy, which contained a qualifier for all bidders. The bid required all bidders to have experience with the University of Kentucky's Medical Center. Mr. Brazley queried the panel, "If Black firms have received no State work in the past ten years, how are we supposed to qualify for that bid package?" The panelists did not provide a response.

#### 5. Exclusion

The general consensus has been that M/WBEs have been systematically excluded from participation in the Commonwealth of Kentucky's purchasing in any significant numbers on a consistent basis forever, and that monumental changes in both attitude and practice will be necessary to effect change of any type.

Reverend Coleman's testimony indicated that not only is Kentucky resistant to the incorporation of MBEs, more so than WBEs, in the purchasing process, but Kentucky at times is defiant about maintaining the status quo.

Mr. Brazley testified that his firm gets no consideration on either price contracts (under \$25,000) or A&E contracts (over \$25,000). Mr. Starks testified that it was only recently that he was able to secure a commercial underwriter. It was accomplished through a diversity program within the company itself, and with the assistance of an African-American official within the State government system.

Ms. Brown testified how she spoke directly with the Human Resources Department who stated they were willing to do business with her, but that she never, ever received any information from them for any purpose. Ms. Roberts from Lextech related her quest for two RFPs over a period of five years, before she was finally able to bid on one of them.

**Deasa Nichols**, Greater Lexington Chamber of Commerce, testified regarding the current availability in numbers of M/WBEs in the Lexington area alone. She also testified that they are very capable, but extremely under-utilized in the marketplace, and how this should not be so.

#### 6. Discrimination In Payments (Slow-pay; no pay)

Limitation of M/WBEs' cash flow also severely limited their long-term viability.

Leonard Paige, testified regarding his experiences in the construction industry with payment. His testimony is as follows, "I know that the State pays the contractor, the prime, twice a month, the 15<sup>th</sup> and the 30<sup>th</sup>. Ten days after that, all of the subs should be paid. Most of the time I get paid once every 40 days...and a lot of times that 40-day pay period stretches out to 42 or 43 days."



## 7. "Good Ol' Boy" Network

Social networks remain an important resource for business development, because a sizable amount of public and private contract work is transacted among friends, casual associates, and business associates. Additionally, connections fostered within corporations and agencies allow firms to receive preferred positions in bid and contract work. Due to the fact that most of these networks are casual in origin, resulting from familial or social ties, the leadership of M/WBE firms are often viewed, and in turn view themselves, as awkward "outsiders" unable to break into networks where all of the major deals are negotiated. Thus, M/WBEs find it difficult to penetrate networks without spending substantial amounts of time and money to develop key relationships with clients.

Participants reported that this is particularly true in the Commonwealth of Kentucky where the desire is very strong to keep "outsiders" outside. The "good ol' boy" network will sacrifice nothing to "outsiders" if they can, but where they must allow participation by "outsiders" (M/WBEs) they will be tolerated, but never allowed into the inner sanctum.

The consensus among those providing testimony was that the "good ol' boy" network pervades all aspects of the Commonwealth of Kentucky's purchasing process. So far, M/WBEs have not been successful in penetrating the "good ol' boy" network in any way.

## **F. Conclusion**

In the interviews and public hearings performed for this study, minority and women business owners consistently identified trends—societal and institutional—limiting the growth and development of minority and women business enterprises. These trends span the finance, marketing, and product/service delivery components of these businesses. Importantly, the challenges identified by these entrepreneurs have an impact on the overall availability and sustainability of the minority and women business communities in the Commonwealth of Kentucky.

## VI. EXISTING RACE & GENDER-NEUTRAL PROGRAMS

Race and gender-neutral measures refer to those remedies that might be extended to all business, or small business in particular, that would address certain exclusionary aspects of a jurisdiction's purchasing and contracting process or barriers within the marketplace as a whole. Examples include reducing bonding or insurance requirements for all firms, or more widely advertising opportunities to bid. Neutral measures also include initiating efforts to assist all small business through general economic development efforts. Outreach efforts to educate small businesses on how to execute commerce would apply as well. In each of these examples, the jurisdiction would extend no explicit preference or benefit to MWBE firms, thus excluding majority-owned firms.

Race neutral alternatives as a mechanism for increasing the availability and utilization of M/WBEs is necessary in an assessment of disparity in a jurisdiction. The need to assess race and gender neutral alternatives is based upon requirements, set forth in Croson to address two critical issues. The issues are:

- Based upon the nature and extent of discrimination, can the effects of discrimination be ameliorated through race or gender neutral programs?
- If the appropriate remedy is a race or gender-based program, how should the program be structured to remedy the effects of past discrimination and stay within constitutional limitations as currently interpreted by the courts?

Both issues are critical in designing a program which complies with the "narrowly tailored program" aspects of the *Croson* decision. Several of the programs listed below target minority and women-owned firms along with small businesses in general but they

provide no preferences. It is within this context that the Griffin & Strong, P.C. team examined the race and the gender-neutral programs which are described below.

### **SMALL AND MINORITY BUSINESS DIVISION:**

The Commonwealth has established a Small and Minority Business Division to act as an advocacy agency for the furtherance and expansion of Kentucky based small, minority and women owned businesses through the utilization of resources available through the state or under the purview of the state.

The division provides the following resources:

#### **General Functions of the Small and Minority Business Division**

The Small and Minority Business Division performs the functions described below with full regard to the economic and demographic characteristics of the Commonwealth of Kentucky.

- Working relationships are maintained with the Kentucky Small Business Development Centers ([www.ksbdc.org](http://www.ksbdc.org)), the Louisville Minority Business Development Center ([www.bennccorp.com](http://www.bennccorp.com)), chambers of commerce ([www.kychamber.com/coc.htm](http://www.kychamber.com/coc.htm)), Kentuckiana Minority Supplier Development Council ([www.kmsdc.org](http://www.kmsdc.org)), NAACP, Urban League, business and professional women's organizations, various city governments, federal agencies, other state agencies, and various organizations and institutions involved in small and minority economic development.
- On a limited basis, the staff provides individualized one-on-one assistance to clients that need help in removing roadblocks.

- Provide small business informational packets to persons who do not have access to a computer/Internet.

### **Small Business Informational Web Sites**

The Small and Minority Business Division has identified web sites that offer information on starting and running a small business. Most of the web's information costs nothing but can be extremely valuable. The web offers tips on writing a business plan, market research, applying for a loan, finding free or low-cost consulting, and other useful topics.

- Business Plan Development
- Marketing Research
- Marketing Planning
- Choose a Business Location
- Patents, Copyrights, and Trademarks
- Business Acquisition
- Record Keeping
- Franchising: Buying a Franchise  
Starting a Franchise

### **Education and Training**

- Identify and promote training opportunities that will create, improve and expand small, minority and women owned businesses in the Commonwealth.
- Coordinate or arrange for specialized seminars to specific vocational groups as in the case of training programs for small, minority and women contractors.

## **Public Sector Purchasing Assistance**

- Assist small, minority and women owned businesses in being placed on the state's bid mailing list.
- Work closely with the Kentucky Procurement Assistance Program (KPAP)([www.edc.state.ky.us/proassis\\*.html](http://www.edc.state.ky.us/proassis*.html)) in disseminating information on contracting and subcontracting opportunities on state and federal projects.
- Assist prime contractors on construction projects to utilize small, minority and women owned businesses.
- Encourage and assist small, minority and women owned businesses to register on Procurement Marketing & Access Network (PRO-Net). ([www.pronet.sba.gov](http://www.pronet.sba.gov))
- Assist small, minority and women owned businesses in identifying resources for bonding.
- Assist small, minority and women owned businesses in becoming certified by making referrals to the Department of Transportation, Office of Minority Affairs. ([www.kytc.state.ky.us/oma](http://www.kytc.state.ky.us/oma))

## **Financing**

- Angel Capital Electronic Network (ACE-Net) <https://ace-net.sr.unh.edu/pub/>
- SBA 504 Loan Program [www.edc.state.ky.us/eddbc.html](http://www.edc.state.ky.us/eddbc.html)
- Linked Deposit Investment Loan Program [www.edc.state.ky.us/kybizinc](http://www.edc.state.ky.us/kybizinc)

### **Advocacy**

- Encourage various agencies to foster small, minority and women procurement opportunities on state, federal and local government levels.
- Support the formation of funding sources for the creation and expansion of small, minority and women owned businesses.
- Encourage financial institutions to make capital more readily available in support of small, minority and women business development, which will include investment and loan capital.
- Assist in the draft of legislation to foster small, minority and women economic development.

The division's utilization has decreased over the past two years. Inquiries from small and minority businesses decreased from 1,623 in 1999 to 1,063 during the 2000 year. Furthermore, the division failed to maintain information on the ethnicity or gender of the businesses that use this service. The inability to identify the type of business entity prevents us from determining utilization by minorities and women owned businesses.

Businesses could benefit from increasing the use of this resource.

### *One Stop Capital Shops:*

- Launched by the U.S. Small Business Administration in 1994
- It was the SBA's response to the President's Empowerment Zone and Enterprise Community Initiative.
- Established to help inner cities and rural areas
- Offers broad federal support through block grants and specialized programs
- From a pool of 400 applicants in 1994, 11 communities were designated Economic Zones and over 90 others were designated Enterprise Communities.
- Assist businesses in obtaining Title XX block grants, eligibility for tax-exempt bond financing, employer tax credits, and coordinated services from federal agencies.
- Originally only Empowerment Zones were eligible for one stop capital shops. Some Enterprise Communities and other non-designated communities have opened them.
- The Kentucky One Stop Capital Shop serves Jackson, Wayne, and Clinton.

**The Kentuckiana Minority Supplier Development Council (KMSDC) was founded and designed to accomplish two principles:**



- develop partnerships between minority business, corporate America and government;
- level the marketplace for basic fairness for all.

**KMSDC's goal** is to increase the amount and quality of business transacted with minority owned and controlled firms throughout the Commonwealth of Kentucky and Southern Indiana. Because of the network of over 40 regional councils, KMSDC as a member of the National Minority Supplier Development Council (NMSDC) can help local minority entrepreneurs have national and global influence.

**Locally, the minority entrepreneur** has the opportunity to develop sales leads and new business through the **Annual Trade Show**, **MEGA meetings** and the more than 150 private and public-sector buying organizations who are corporate members of KMSDC

**Business Consortium Fund:**

The fund provides contract financing to minority businesses that are certified by an NMSDC affiliate council and have a contract or purchase order with a corporate member. The maximum loan or credit line available is \$500,000 and the fund is administered locally by National City Bank.

**Certification:**

To join KMSDC a minority business is required to complete a certification process to determine whether the company is indeed owned and controlled by a person(s) representing a racial minority group. This certification procedure includes a careful review of the application and supporting documentation; an on-site visit, if appropriate; review and recommendation by the Certification Committee; and approval/disapproval by the KMSDC Board of Directors. To date, more than 200 minority-owned businesses have been certified by the Kentuckiana Council.

**Corporate Connection Program:**

KMSDC corporate members invite minority business owners to their facility to learn about contracting opportunities and meet key corporate executives.

**Minority Business Executive Scholarship Program:**

Through an in-house scholarship fund, KMSDC can provide two individuals scholarship support to attend minority business executive training programs at colleges and universities. The government is a member of KMSDC but has not used the referral services and other programs that are offered. KMSDC has strong local and national influence.

**Community Development Bank**

Program Description

The Louisville Community Development Bank (LCDB) opened in January 1997. The bank's parent holding company, the Louisville Development Bancorp, Inc., has two subsidiaries-the Louisville Community Development Bank itself and a for-profit real estate development company. The bank targets its activities on the immediate area of the EC and offers no consumer loans or checking accounts. A nonprofit affiliate, the LCDB-Enterprise Group, supports EC businesses as a technical assistance provider, small business incubator, and lender with \$1 million in startup capital from the EC.

**Conclusion**

The increased use of these resources will assist small businesses in expanding their services through increased capital, additional training, and exposure to new prospective markets.



## VII. CONCLUSIONS & RECOMMENDATIONS

### A. Introduction

Since commencing this study in October 1999, Griffin and Strong, P.C. has conducted an exhaustive study of the condition of minority and women-owned businesses in the Commonwealth of Kentucky. We have conducted a thorough analysis of the external legal decisions that impact any effort that the Commonwealth of Kentucky has taken or may take in the future to assist minority and women-owned businesses in the Commonwealth. We have also undertaken an exhaustive quantitative analysis that has been detailed in the proceeding pages. Furthermore, we have interviewed a substantial number of Commonwealth officials and we have carefully reviewed the internal regulations and processes of the Commonwealth in the area of purchasing and procurement. Additionally, in this study, we conducted a more detailed historical analysis than is typical. During our consultation with officials who serve on the Minority Council of the Commonwealth, the belief was clearly expressed that any findings of this study could not be put in their proper context without a thorough historical analysis. We conducted numerous anecdotal evidence interviews with minority and women-owned business owners as well as majority business owners and Commonwealth officials. We

⌞ *Minority and Women-owned businesses are utilized at very low levels by the Commonwealth of Kentucky. These low levels of utilization have a negative impact on the entire economy of the Commonwealth.*

also held a series of public hearings in the Commonwealth and conducted an extensive survey of the current programs available to minority and women-owned business owners in the Commonwealth. As a result of this exhaustive analysis, we have derived several conclusions:

1. Minority and women-owned businesses are utilized at a very low level by the Commonwealth of Kentucky. These low levels of utilization have a negative impact upon the economy of the Commonwealth and if they are allowed to persist over time could put the macro economy of the Commonwealth at risk.

According to a recent study conducted by the Milken Institute for the Minority Business Development Agency, minority-owned firms are surpassing the growth of all U.S. businesses, growing at a rate of 17 percent per year, 6 times the growth rate of all firms. That study concluded that economic growth cannot be sustained without the inclusion of minority businesses and an infusion of capital into those businesses.<sup>273</sup> Therefore, we conclude that the low levels of utilization of minority and women-owned businesses by the Commonwealth of Kentucky is having and will continue to have a negative impact on the entire economy of the Commonwealth.

⊥ *The availability of minority and women-owned businesses for the Commonwealth of Kentucky is extremely low based on an analysis of firms who actually seek to do business with the Commonwealth.*

<sup>273</sup> Yago, Glenn and Aaron Pankratz, 2000, "The Minority Business Challenge; Democratizing Capital for Emerging Domestic Markets." Milken Institute and Minority Business Development Agency, September 25.

2. The availability of minority and women-owned businesses for the Commonwealth of Kentucky is extremely low based on an analysis of firms who actually seek to do business with the Commonwealth. Based on our analysis, substantially fewer firms that are owned by minorities or women actively seek to do business with the Commonwealth than exist within the confines of the Commonwealth. Therefore, there is a substantial gap between actual and potential availability in the Commonwealth of Kentucky.

⊥ *There are substantial disparities between availability and utilization in some categories with respect to some ethnic groups in some years.*

3. There are substantial disparities between availability and utilization in some categories with respect to some ethnic groups in some years. There are also very wide swings and occasionally peaks of over-utilization of some ethnic groups in some years based on the data that we have reviewed. Because of the relatively low level of availability as determined by bidding activity and the relatively small amount of utilization as determined by a review of the actual procurement dollars spent, it can well be concluded that even in those instances in which there is seemingly over-utilization, minority and women-owned businesses received substantially less business than one would expect by viewing the overall census availability of minority and women-owned firms.

4. During our purchasing practices and policies review, we observed substantial institutional barriers, which inhibit the ability of minority and women-owned businesses to compete effectively for business with the Commonwealth of Kentucky. The very existence of those barriers could possibly explain the lack of bidding activity on the part of minority and women-owned firms. During our qualitative evidence gathering in anecdotal interviews, public hearings, and surveys, we determined that minority and women-owned businesses generally have a negative impression of their ability to do business with the Commonwealth of Kentucky.

Based on the totality of the findings of this study, we, the research team at Griffin and Strong, P.C., conclude that this study demonstrates evidence of discrimination against minority and women-owned firms in the Commonwealth of Kentucky. However, we also conclude that the quantitative evidence shows such a low level of actual availability to the Commonwealth based on actual bidding activity that the Commonwealth will be somewhat constrained in terms of its ability to craft a race or gender conscious remedy involving set asides or price preferences. Therefore, we recommend that the Commonwealth of Kentucky address the documented barriers to minority and women-owned businesses participation in its procurement and contracting activities.

⊥ *During our purchasing practices and policies review, we observed substantial institutional barriers which inhibit the ability of minority and women-owned businesses to compete effectively for business with the Commonwealth of Kentucky.*

⊥ *We recommend that the Commonwealth of Kentucky address the documented barriers to minority and women-owned businesses participation in its procurement and contracting activities.*

There appear to be four barriers that inhibit the growth of minority and women-owned businesses from development and success; they are as follows:

- Access to Government Contracts
- Capital
- Bonding
- Business development and training

**B. Access To Government Contracts**

The Kentucky State Auditor, in its 1999 statewide Single Audit, found that the Finance and Administration cabinet neglected its responsibilities to enforce EEO laws and comply with small business and small minority business set-asides. The Auditor found errors in the following areas:

- Requiring contractors to certify attempts to employ minority persons
- Incomplete employment records were excepted by the Cabinet weakening the verification of sub-contractor EEO compliance
- Failing to exact penalties for non-compliance
- Neglect to conduct site visits by Office of EEO/Contract Compliance

⊥ *We observed substantial institutional barriers which inhibit the ability of minority and women-owned business to effectively compete for business with the Commonwealth. The perception of a lack of access, based in reality, results in very low levels of bidding by minority and women-owned businesses.*

⊥ *We believe that a centralized system makes it easier to utilize small business in general, and minority and women business enterprises in particular, however, there are certain components that should be reworked to obtain optimal results.*



- Ignoring statutory mandates for small business and minority business set-asides

These findings mirror the findings of the Griffin & Strong, P.C. researchers. Therefore, we recommend the following structural changes:

### Structural Changes

Specifically, the study team believes that certain structural changes should be made in the way that the Commonwealth of Kentucky conducts its business. Our investigation determined that there is a substantial amount of centralization in the contracting and procurement process at the Commonwealth of Kentucky. We believe that a centralized system makes it easier to utilize small business in general, and minority and women business enterprises in particular, however, there are certain components that should be reworked to obtain optimal results. It is our recommendation that a system which dictates accountability, in terms of making the effort to do business with small business in general and minority and women firms in particular be developed:

#### 1. Reporting

We recommend that the authority and resources which are currently divided between the Finance and Administration Cabinet, Transportation

⊥ *We recommend that the authority and resources which are currently divided between the Finance and Administration Cabinet, Transportation Cabinet and Economic Development Cabinet be centralized in the Office of the Governor.*

⊥ *We recommend that the certification process be centralized for the entire*

Cabinet and Economic Development Cabinet be centralized in the Office of the Governor. We specifically recommend that this be done by having the Office of the EEO and Contract Compliance, the Small and Minority Business Division and the DOT Office of Minority Affairs report directly to the Governor's Office of Minority Affairs. We recommend that the position of Director of Business Development be created to report to the Director of the Governor's Office of Minority Affairs. The directors of the Small and Minority Business Division and the DOT Office of Civil Rights should report to this staff person. This would provide for coordination and control of these vital and important economic development functions in the Office of the Governor.

## **2. Certification**

We recommend that the certification process be centralized for the entire Commonwealth and that either adequate staff should be hired to perform this function or the function should be outsourced.

## **3. Monitoring and Contract Administration**

We recommend that the staff of the Office of EEO and Contract Compliance be increased so that it is better able to monitor the programs it is

⊥ *The Commonwealth of Kentucky should implement a management information system which can offer accurate and timely*

charged with administering. Currently, the responsibilities of the office far exceed the capacity of the current staff to perform their required functions consistently and effectively.

#### **4. Management Information System**

The Commonwealth of Kentucky should implement a management information system which can offer accurate and timely information about contract activity at every stage; from the original solicitation to the finalization of a contract. These management information systems should reflect the purchasing profiles of each individual procurement agent. Accurate information regarding the utilization of small business, minority businesses and women business enterprises should be maintained. Moreover, each purchasing agent's record should be reviewed regarding the utilization of minority and women business enterprises.

The Finance and Administration Cabinet issued a Request for Information with regard to an "Electronic System to Assist in Minority Business Procurement on August 14, 2000 and a vendor conference was held on August 28, 2000. This effort is commendable, should be encouraged, and should continue.

#### **5. Procurement Officer Reviews**

All personnel involved in the purchasing and contracting process should be subject to quarterly

⊥ *All personnel involved in the purchasing and contracting process should be subject to quarterly performance*

performance reviews to ensure that they understand the objectives of the Commonwealth of Kentucky with regard to the utilization of small businesses in general and minority and women business enterprises in particular. The evaluations of purchasing agents should hinge on their personal effectiveness in reaching out to, and utilizing these businesses.

**6. Procurement Officer Training**

Procurement officers at the Commonwealth of Kentucky should be trained to deal with small businesses and minority and women business enterprises. Training is necessary, for these individuals to understand the problems of the businesses that they are dealing with and will better enable them to attempt to find solutions to those problems at the purchasing and contracting level.

**7. Executive Order of the Governor**

The Governor should consider issuing an Executive Order in which all state agencies, authorities, commissions and institutions are required to make a concerted effort to increase the level of minority and women business participation in the state contracting process by increasing bid opportunities extended to the minority and women business community and by providing more direct assistance to minority and women vendors on how the state contracting process works. This order

1 *Kentucky procurement officials should be trained to deal with small businesses and minority and women business enterprises.*

---

should ensure that all bid documents include statements encouraging minority and women business participation and statements encouraging majority business to subcontract with minority and women business.

There are numerous provisions which such and order could contain which would result in an increase in the utilization of minority and women businesses without running afoul of the constitutional requirement of equal protection. Such an Order was issued by the Governor of Georgia in January 1999 and has had an extremely positive effect on minority business utilization in that state. A copy that Order is included as Appendix B to this study.

#### 8. Outreach

The Commonwealth of Kentucky should consider an enhancement of its current *outreach effort*. Within this framework, a number of seminars could be held by the Commonwealth which would describe to a small minority or women-owned business how to do business with the Commonwealth. Brochures should also be printed, and widely disseminated throughout the Commonwealth, which describe how to do business with the Commonwealth of Kentucky. In addition, all firms on any of the Commonwealth's bidders list (which would include all certified minority and women business enterprises) should be sent notices

*consider issuing an Executive Order in which all state agencies, authorities, commissions and institutions are required to make a concerted effort to increase the level of minority and women business participation in the state contracting process.*

1 *The Commonwealth of Kentucky should consider an enhancement of its current outreach effort.*

of upcoming opportunities. The Commonwealth should consider publishing a newsletter which would be mailed or disseminated by e-mail to all firms on the bidders lists.

#### 9. Review Contract Specifications

The Commonwealth of Kentucky should review all contract specifications and identify barriers for the utilization of small minority and women-owned businesses. This review would ensure that there are no inherent preferences for certain companies, which have traditionally done business with the Commonwealth of Kentucky, and which would exclude other businesses from participating in the market place. In addition to creating opportunities for a wide range of businesses, these types of efforts have led to lower costs for governmental entities. There is substantial evidence that the Commonwealth of Kentucky, utilizes certain bid specifications which make it difficult for small businesses in general, and minority and women business enterprises in particular, to compete. Therefore, a comprehensive review of all bid specifications should be conducted by the Commonwealth of Kentucky.

#### 10. Vendor Payment

The Commonwealth of Kentucky should also consider the implementation of an aggressive program to expedite the payment of vendors,

⊥ *The Commonwealth of Kentucky should review all contract specifications and identify barriers for which inhibit the utilization of small minority and women-owned businesses.*

⊥ *The Commonwealth of Kentucky should also consider the implementation of an aggressive program to expedite the payment of vendors,*

contractors and subcontractors. This program would have a very beneficial effect for small businesses in general and minority and women business enterprises in particular, because many of these firms lack capital. Therefore, a quick pay program should be instituted by the Commonwealth as a part of any overall effort to assist small, minority and women-owned businesses.

### C. Capital

There is a critical need to increase the level of funding for minority and women-owned businesses in the Commonwealth of Kentucky. The previously mentioned research report entitled, "Democratizing Capital for Emerging Domestic Markets", which was conducted by the Milken Institute for the Minority Business Development Agency found that:

"Capital gaps exist at every level for financing the capital structure of minority businesses: equity, mezzanine and senior debt."

"Despite advances in venture capital, mezzanine debt and asset-backed securitization, the vast majority of minority firms do not have access to financing technologies available to larger companies."

"Of the estimated \$95 billion in the private equity market in 1999, only \$2 billion is managed by companies whose focus is supplying capital to

⊥ *Financing minority-owned businesses serves a dual purpose. It provides needed capital to a fast-growing business sector while creating a vehicle for greater minority participation in the workforce.*

entrepreneurs from traditionally underserved markets."

"Funds that include gender and ethnic-specific entrepreneurs and markets remain undercapitalized by the universe of institutional investors, despite the proliferation of specialty fund strategies. More targeted investment funds and instruments need to be designed and built for this new asset class."

"To expand, it is critical that minority businesses gain access to the equity markets. The average venture-backed company employs nearly 100 workers within five years and creates almost twice as many jobs as their nonventure-backed peers. Venture-backed firms experience at least a 40 percent job growth each year as compared to a 2.5 percent decline in jobs for Fortune 500 companies."

"In addition, sales per employee grow twice as quickly for minority businesses as for Fortune 500 companies, growing at an average 16.5 percent as opposed to 7.9 percent for the largest firms. Despite these growth rates, entrepreneurial markets capture only a tiny portion of venture capital, leaving them disproportionately underserved."

"The robust performance of companies from emerging domestic markets-and the lost opportunity if they remain underfinanced sends a clear message. Well-funded and managed minority firms are successful. Job creation parallels wealth creation

⊥ *Minority businesses are a driving force behind growth and will be a major segment of the U.S. economy in the 21<sup>st</sup> century as a transition to a more diverse demographic majority emerges.*

⊥ *The minority business community is growing, profitable and free of the risk inherent in more distant markets. Failure to invest in this business sector will lower productivity and likewise act as a*



recognizing the imperative of financing emerging domestic markets as a new asset class."

"Financing minority-owned businesses serves a dual purpose. It provides needed capital to a fast-growing business sector while creating a vehicle for greater minority participation in the workforce."

"Minority businesses are a driving force behind growth and will be a major segment of the U.S. economy in the 21<sup>st</sup> century as a transition to a more diverse demographic majority emerges. Asset managers need to tap these sources of higher profits and growth in the minority business sector to sustain yields necessary to cover longer-term liabilities demographically driven by the aging majority baby boomer population increasingly dependent upon the productivity and growth of an emerging new majority of firms and entrepreneurs."

"Institutional investors, insurance companies, banks, diversified financial services firms, private equity investors and pension funds will have to broaden their investment strategy to include securities and firms in emerging domestic markets as a new asset class. Diversity in investment targets ought to become a key part of diversification in portfolio management strategies."

"The minority business community is growing, profitable and free of the risk inherent in more

└ *Institutional investors, insurance companies, banks, diversified financial services firms, private equity investors and pension funds will have to broaden their investment strategy to include securities and firms in emerging domestic markets as a new asset class.*

distant markets. Failure to invest in this business sector will lower productivity and likewise act as a brake on the economy."<sup>274</sup>

### **What the Commonwealth Should Do**

Fortunately, the Commonwealth of Kentucky has the rudiments of an infrastructure that can move the Commonwealth to a position of national leadership in this area. The Louisville Community Development Bank, which was mentioned in the preceding chapter, is a national leader in the area of economic opportunity. This bank has been awarded the prestigious John J. Gunther award by the United States Department of Housing and Community Development for best practices in housing and community development. According to HUD, "In June 1995 HUD Awarded a \$4 million Economic Development Initiative grant to Louisville, the first such grant to be used as an equity investment for a private bank. That grant leveraged an additional \$4 million in Section 108 loan funds to build the initial deposit base. In 1996 the city was awarded a \$2.3 million Community Development Financial Institution forgivable loan from the U.S. Treasury. The bank has grown from \$21 million to \$26.5 million in deposits. The bank has made more than \$5 million in commercial loans, has doubled its first-year goal of assisting in the creation of 80 jobs, and has achieved six times

---

<sup>274</sup> Ibid

its goal of developing five new businesses. It has made loans for daycare center expansion, apartment renovations, and preservation of older properties for an arts center."

### 1. New Market Venture Capital Program

Given the success of this bank the Commonwealth of Kentucky would have a decided advantage if it partnered with the Louisville Community Development Corporation to create New Market Venture Capital and BusinessLINC programs with federal funding.

The Small Business Reauthorization Act of 2000 (HR 5667) was one of a number of bills that were rolled into the final omnibus package (PL 106-554) late in the 2000 U.S. Congressional Session. The bill reauthorizes funding for existing programs and operations of the Small Business Administration (SBA), and establishes several new programs including the New Markets Venture Capital, BusinessLINC, and the Federal and State Technology Partnership programs.

The New Market Venture Capital program, which was a high priority for the Clinton administration, authorizes SBA to enter into agreements with 10 to 20 qualifying companies in low-income areas to promote economic development and job opportunities in those areas.

*partner with the  
Louisville  
Community  
Development Bank  
to create a New  
Market Venture  
Capital and  
BusinessLINC  
program in  
partnership with the  
United States Small  
Business  
Administration.*

*└ BusinessLINC,  
another new  
program, is  
authorized at \$6.6  
million each year  
from FY2001  
through FY2006.*

The measure authorizes such sums as necessary to guarantee \$150 million of debentures and \$30 million in operational grants.

## 2. BusinessLINC Program

BusinessLINC, another new program, is authorized at \$6.6 million each year from FY2001 through FY2006. The program is charged to promote business growth in inner cities and economically distressed rural areas by matching large and small firms in business-to-business partnering and mentoring relationships. The eligibility is open to public and private entities or any combination of public and private entities.

### D. Bonding

#### 1. The Bonding Program

The Commonwealth of Kentucky should additionally consider the implementation of an aggressive program to assist small minority and women-owned businesses in obtaining bonding and insurance. The Commonwealth should consider reauthorizing its previously successful bonding program with controls to monitor and prohibit employee theft.

#### 2. Wrap Up Insurance Program

Another type of program the Commonwealth should consider is an owner controlled or "wrap up" insurance program on all

⊥ *The Commonwealth of Kentucky should additionally consider the implementation of an aggressive program to assist small minority and women-owned businesses in obtaining bonding and insurance.*

⊥ *Small firms, although they are often technically sound, sometimes lack basic business or other skills that enable them to remain*

*Griffin & Strong, P.C.*

business with the Commonwealth provide businesses owned and controlled by minorities and women opportunities to participate, to the extent of their availability, on contracts which are paid for, in whole or in part, by the Commonwealth.

To be considered responsive, bidders and proposers would be required to use good faith efforts to make contracting, subcontracting, and purchasing opportunities available to minority owned firms and women owned firms. Prior to award of a contract, the Commonwealth would evaluate the documentation of each bidder's or proposer's compliance by: 1) submittal a non-discrimination plan outlining the bidder's or proposer's intent to utilize a diverse business base when awarding subcontracts, purchasing, or teaming; 2) agreement to execute a written and sworn covenant of non-discrimination; 3) agreement to submit to ongoing monitoring by submittal of reports to the Commonwealth after contract award, as continuing evidence of the contractor's commitment to non-discrimination; and 4) submitting to investigations or audits by the Commonwealth in connection with routine contract monitoring or as a result of specific allegations of discrimination.

- \* *Demonstration of commitment to non-discrimination:*
- 1) Submittal of plan*
  - 2) Covenant of non-discrimination*
  - 3) On-going monitoring and reporting*
  - 4) Audit compliance; investigate allegations of discrimination*



---

*Griffin & Strong, P.C.*

We believe that if all of our recommendations are implemented, the Commonwealth of Kentucky will lead the nation in the area of minority and women-owned business utilization.

*Griffin & Strong, P.C.*<sup>275</sup>

---

<sup>275</sup> The names, educational credentials and the role played on this project of our research team is listed in Appendix E.

